A

NEW ABRIDGMENT

OF THE

L A W.

By MATTHEW BACON,
Of the MIDDLE TEMPLE, Esq;

THE FIFTH EDITION, CORRECTED;
WITH
Many Additional NOTES and REFERENCES.

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ADVERTISEMENT.

IN Juſtice to the ſeveral Perſons who have been concerned in this ABRIDGMENT, it is thought proper to inform the Publick; That the Fourth Volume, as far as the End of the Title *Sheriff*, was compiled by the late *Matthew Bacon*, Eſq; who compiled the Three former Volumes; from thence, to the End of the Title *Verdict*, in the Fifth Volume, by *Joſeph Sayer*, Serjeant at Law; the remaining Part of the Fifth Volume by the late *Owen Ruffhead*, Eſq.

MAY 27 1925

A

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IN THIS VOLUME,

AND THEIR

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Tender

Tender and bringing Money into Court upon the common Rule.

A Tender is an Offer to pay a Debt, or to perform a Duty.

Bringing Money into Court is depoſiting Money in Court, for the Satisfaction of a Debt or Duty.

Wherever a Tender of Money is pleaded, and the Debt is not diſcharged by the Tender and Refuſal, Money may be brought into Court without Leave of the Court: Nay the Money tendered muſt, as hereafter will be ſhewn, in ſuch Caſe be brought into Court.

In all other Caſes Leave of the Court muſt be had, before Money can be brought into Court.

The Rule, under which Leave to bring Money into Court is granted, is in ſome Caſes, as in the Caſe of an Ejectment by a Mortgagee, founded upon a particular Act of Parliament.

This Rule is in other Caſes founded upon the diſcretionary Power of the Court.

By the latter Rule it is ſometimes ordered, that upon bringing Money into Court the Proceedings in the Action ſhall be ſtayed.

At other Times it is ordered, that the Money brought into Court ſhall be ſtricken out of the Declaration; and that the Plaintiff ſhall not, at the Trial of the Iſſue, be permitted to give Evidence for the ſaid Money.

The Rule by which the Money brought into Court is ordered to be ſtricken out of a Declaration, is from its being more frequently granted, than that by which it is ordered that the Proceedings in the Action ſhall be ſtayed, called the common Rule.

As the common Rule, which was introduced to ſupply the Defect of having made a Tender, is the only one which is connected with a Tender, it is not intended to treat profeſſedly, under this Title, of any other Rule for bringing Money into Court.

By Reaſon of the Connexion, between making a Tender and bringing Money into Court upon the common Rule, it has been thought proper to treat of theſe two Things under the ſame Title: Yet the Deſign is that each ſhall, as far as it can conveniently be done, have a diſtinct Conſideration.

Under this Title it will be proper to ſhew,

(A) By whom a Tender may be made.
(B) What is a good Tender.

1. As to the Manner of tendering.
2. As to the Thing tendered.

(C) At

(C) At what Place a Tender muſt be made.
(D) At what Time a Tender muſt be made.
(E) To whom a Tender muſt be made.
(F) The Conſequences of a Tender and Refuſal.
(G) The Conſequences of being ready to tender, when the Party, to whom it was intended to have been made, was not preſent.
(H) Of pleading a Tender.

1. In the general.
2. Where *Uncore priſt* is pleaded.
3. Where *Uncore priſt* together with *Tout temps priſt* is pleaded.
4. Where a *Profert in Curia* is pleaded.

(I) The Conſequences of a Profert in Curia.
(K) Of bringing Money into Court upon the common Rule.
(L) At what Time Money may be brought into Court upon the common Rule.
(M) Of pleading where Money has been brought into Court upon the common Rule.
(N) The Conſequences of bringing Money into Court upon the common Rule.
(O) In what Caſes a Tender may in the general be made, or Money may be brought into Court upon the common Rule.
(P) Of tendering or bringing Money into Court upon the common Rule in particular Actions.

1. In an Action of *Aſſumpſit*.
2. In an Action upon the Caſe.
3. In an Action of Covenant.
4. In an Action of Debt.
5. In an Action of Ejectment.
6. In an Action againſt a Juſtice of the Peace on the Account of ſomething done in the Execution of his Office.
7. In an Action of Replevin.
8. In an Action of Treſpaſs.
9. In an Action of Trover.

(A) By whom Tender may be made.

1. WHEREVER the Right of tendering is perſonal, the Tender muſt be made by the Party himſelf. 7 Rep. 13. 1 Inſt. 208.

2. A Tenant who is liable to a Writ of *Ceſſavit* muſt, if he would prevent the Lord from recovering the Land, perſonally tender the Rent which is in Arrear. Bro. Tend. pl. 29. Term de Ley 102.

3. If a Feoffment be made, with Condition, that *if the Feoffor pay a Sum of Money to the Feoffee*, it ſhall be lawful for the Feoffor and his Heirs to enter, and the Feoffor die before the Money is paid, no Tender can be made by his Heir: For the Right of tendering is in this Caſe as much perſonal, as if the Words had been, *if the Feoffor during his Life pay the Money*. 1 Inſt. 208.

4. But a Tender made by a Servant, or by a Stranger, on the Behalf and at the Deſire of a Party, is as good, notwithſtanding the Right of tendering be perſonal, as if it had been made by the Party himſelf. Cro. Eliz 48. Crop. *v.* Hambleton.

5. Wherever the Right of tendering is not perſonal, a Tender may be made by any Perſon, who is a Privy to the Party in whom the Right of tendering is. Latch 107. 7 Rep. 13. 1 Inſt. 206, 207, 208.

6. If a Feoffment be made, with Condition, that if the Feoffor pay a Sum of Money to the Feoffee on a Day certain, it ſhall be lawful for the Feoffor and his Heirs to enter, and the Feoffor die before the Day, a Tender may be made at the Day, either by the Heir of the Feoffor as a Privy in Blood or by his Executor as a Privy in Repreſentation; the Right of tendering not being in this Caſe perſonal. 1 Inſt. 206, 208, 209. 4 Rep. 123.

7. A Teſtator, after deviſing Land to his Wife for Life, deviſed the Remainder to *Daniel* his ſecond Son in Fee; provided nevertheleſs, that if *Nathaniel* his third Son ſhould, within three Months after the Death of the Teſtator's Wife, pay the Sum of Five Hundred Pounds to *Daniel* his Executors or Adminiſtrators, that *Nathaniel* and his Heirs ſhould have the Land. As *Nathaniel*, who ſurvived the Teſtator, died during the Life of the Teſtator's Wife, a Queſtion aroſe, whether the Heir of *Nathaniel* ſhould, on the Payment or Tender of the Money within the Time limited, be intitled to the Land. The Opinion of *Parker* Chancellor and *Jekyll* Maſter of the *Rolls*, who both conſidered it as a mere legal Queſtion, was, that the Right of paying or tendering the Money was not in this Caſe perſonal, and conſequently that it deſcended upon the Heir of *Nathaniel*. 10 Mod. 419, 424. 425. Marks *v.* Marks.

8. Wherever a Grant is made of an Eſtate, with Condition to be void upon tendering a certain Thing therein mentioned by the Grantor, a Tender, if the Right of making it be not perſonal, may be made by any Perſon, who becomes intereſted in the Condition, although he be not a Privy to the Grantor. 1 Inſt. 206, 207.

9. Sir *Francis Engleſield* by Indenture covenanted to ſtand ſeiſed of the Manor of *Engleſield*, to the Uſe of himſelf for Life, Remainder to the Uſe of *Francis Engleſield* his Nephew and the Heirs of his Body, Remainder to the Uſe of the right Heirs of his ſaid Nephew, who at the Time of making the Deed was an Infant. In the Indenture it was afterwards ſaid, that the Covenant in Favour of the Nephew was not intended to be abſolute during the Life of Sir *Francis*; and, with a View that the Uncle might, if as the Nephew grew up he ſhould prove extravagant, or be addicted to any enormous Vice, have a Check upon him, it was provided; that if the Uncle ſhould by himſelf or by any other Perſon, during his natural Life, tender to the Nephew a Ring of Gold, with an Intent to make the Uſe of the Indenture void as to the Nephew, that then the ſaid Uſe ſhould be void. Sir *Francis* being afterwards attainted of High-Treaſon by Act of Parliament, 7 Rep. 12, 13. Engleſield's Caſe.

liament, and the Manor being thereby forfeited to Queen *Elizabeth*, ſhe authorized two Perſons to tender a Ring of Gold to the Nephew, with an Intent to make the Uſe of the Indenture void as to the Nephew. Upon this a Queſtion aroſe, whether the Uſe was by this Tender made void? It was inſiſted on Behalf of the Nephew, that as the Subſtance of the Condition, under which the ſaid Uſe might be made void, was to give Sir *Francis* an Opportunity of declaring his Intention, and the Tender of the Ring was only an outward Ceremony for declaring ſuch Intention, the Right of tendering the Ring was ſo annexed to his Perſon, that it could not be tranſferred; that as the Indenture was founded in natural Love and Affection, the Uncle would, which no Stranger could do, have exerciſed theſe in judging of the Diſpoſition of his Nephew. It was moreover ſaid, that by the common Law, the Guardianſhip of an eldeſt Son is ſo annexed to his Father's Perſon, that it can neither be transferred nor forfeited. But the whole Court were of Opinion, that the Recital of the Cauſe, which might induce the Uncle to reſerve the Power of tendering to himſelf, was only Flouriſh or Preamble, and not Parcel of the Condition, which conſiſted ſolely in the Tender of the Ring, and that this might be tendered, under the expreſs Words of the Condition, by any other Perſon as well as Sir *Francis*; and conſequently that the Right of tendering, it not being perſonal, was now devolved upon the Crown.

1 Inſt. 207. 10. It is in the general true, that a Tender cannot be made by one who has no Intereſt in the Condition, upon which the Right of tendering is founded.

Cro. Eliz. 132. Watkins *v.* Aſhwicke. 11. If the Money, due upon a Mortgage of an Infant's Eſtate, be tendered by a Perſon who is neither Guardian to the Infant, nor has any Intereſt in the Eſtate, the Tender is void.

1 Inſt. 206. 12. But any Perſon may make a Tender on the Behalf of an Ideot; for the Law, by Reaſon of his utter Inability to act for himſelf, allows this to be done out of Charity.

(B) What is a good Tender.

1. As to the Manner of tendering.

Latch 70. Warner *v.* Harding. 1. A Tender is not good, unleſs the Perſon making it declare upon what Account it is made.

1 Leon. 71. 2 Lev. 209. 3 Lev. 104. 12 Mod 353. 2. It is not enough for the Perſon, who intends to make a Tender, to ſay I am ready to pay the Debt, or to perform the Duty: But he muſt make an actual Offer to pay the one, or to perform the other.

Noy 74. Suckling *v.* Coney. 3. The Mortgagor ſaid to the Mortgagee, I am here ready to pay you the Money due upon the Mortgage: But at the ſame Time kept the Money, which was in a Bag, under his Arm. This was holden not to be a good Tender.

5 Rep. 115. Wade's Caſe. 1 Inſt. 208. 4. But an Actual Offer of Money in a Bag is a good Tender, provided it be proved, that the Sum intended to be tendered was in the Bag: For it is uſual to carry Money in a Bag; and it is the Duty of the Party who receives it to tell it, and to examine whether it be good.

Str. 777. Duke of Rutland *v.* Hodgſon. 5. *A.* contracted to pay *B.* ten thouſand Pounds, upon his transferring to *A.* or his Order one thouſand Pounds *South-Sea* Stock, at or before a certain Time. *B.* before the Time, made an actual Transfer of the Stock: But becauſe *A.* did not come or ſend a Perſon to accept the Stock and pay for it, the Transfer was afterwards vacated.

6. But

6. The Transfer of the Stock ſeems in this Caſe to have been made *ex abundanti Cautela:* For it has been holden, that an actual Transfer is not neceſſary to the making of a Tender of Stock good.

7. In an Action of Covenant the Plaintiff declared, that the Defendant had agreed to pay him two thouſand Pounds, upon his transferring to the Defendant one thouſand Pounds *Hudſon's Bay* Stock; and the Plaintiff averred that he offered to transfer the Stock. It was holden, that this, although there was not an actual Transfer of the Stock, was a Tender ſufficient to intitle the Plaintiff to the Money. Ld. Raym. 686. Lancaſhire *v.* Killingworth, 12 Mod. 530.

2. As to the Thing tendered.

8. It was heretofore holden, that if a Tender of Rent in Arrear is intended to be made, the whole Rent, without deducting the Land Tax, muſt be tendered. Bro. Tend. pl. 39. 2 Lill. P. R. 688.

9. But in every Land-Tax Act, made for ſome Years paſt, there is this Clauſe, "The ſeveral and reſpective Tenant and Tenants of Houſes, Lands, "Tenements and Hereditaments, in *England*, *Wales*, or *Berwick* upon "*Tweed*, which ſhall be rated by virtue of this Act, are hereby required "and authorized, to pay ſuch Sum or Sums of Money as ſhall be rated "upon ſuch Houſes, Lands, Tenements and Hereditaments, and to de"duct out of the Rents ſo much of the ſaid Rate, as in reſpect of the ſaid "Rents of any ſuch Houſes, Lands, Tenements and Hereditaments, the "Landlord ſhould and ought to bear; and the ſaid Landlords, both me"diate and immediate, according to their reſpective Intereſts, are hereby "required to allow ſuch Deductions and Payments, upon Receipt of the "Reſidue of the ſaid Rents." 30 G. 2. c. 3. ſ. 15, 16.

10. If *A.* be indebted to *B.* in divers diſtinct Sums of Money, he may make a Tender of any one of the Sums. Bro. Tend. Pl. 39.

11. A Tender of more Money than is due is good for what is due: For *omne majus continet in ſe minus*; and it is at the Peril of the Perſon, to whom the Tender is made, if he take more than is due. 4 Rep. 115. Wade's Caſe Str. 916.

12. If the Condition of a Bond be, that the Obligor ſhall at a Day and Place certain pay twenty Pounds or deliver ten Kine, at the then Choice of the Obligee, a Tender muſt be both of the Money and the Kine. 1 Leon. 68. Fordley's Caſe.

13. A Tender in any Money coined at the Mint, upon which there is thh King's Stamp, is good; for all ſuch Money is current, in Proportion to its Value, without a Proclamation. Comb. 387. Dixon *v.* Willoughs. 1 Inſt. 207. Salk. 446.

14. If a Contract be to pay a hundred Pounds in a foreign Coin, a Tender to the Amount of this Sum in any Current Coin of this Kingdom is good. Lat. 84. Ward *v.* Bidgwin.

15. If Money be made current by Proclamation at a higher Rate than its intrinſick Value, a Tender in ſuch Money, according its current Value, is good.

16. Queen *Elizabeth* cauſed ſome mixed Money to be coined at the Mint, and ſent it to *Ireland* with a Proclamation to be current there at a certain Value; and by the ſame Proclamation a Stop was put to the Currency of all other Coins in that Kingdom. It was holden, that a Tender made in this Money, according to its current Value was good. Dav. 18. The Caſe of mixed Money.

17. If the Money, which has been tendered, become after a Refuſal to accept thereof current at a leſs Value, than it was current at when the Tender was made, the Party who refuſed to accept the Money muſt bear the Loſs.

Dyer 81. Barrington v. Potter. Dav. 27. 18. In an Action of Debt for Rent, the Defendant pleaded a Tender of the Rent in Pieces of *Engliſh* Money called Shillings, every one of which was, at the Time of the Tender, current at the Value of twelve Pence, and that he is yet ready to pay the Rent in the ſaid Pieces at that Value. The Plaintiff demurred, and for Cauſe alledged, that before the bringing of the Action, the ſaid Pieces of Money were by Proclamation made current only at the Value of ſix Pence: But he afterwards thought proper, to accept the Money according to the Value when the Tender was made.

5 Rep. 114. Wade's Caſe. 1 Inſt. 207. 19. If a Foreign Coin be made current in this Kingdom by Proclamation, a Tender in ſuch Money is good; for it thereby becomes lawful Money of this Kingdom.

1 Inſt. 208. 20. If the Money tendered has been accepted, the Acceptor has no Remedy, although ſome of it be counterfeit or deficient in Value, or although there be not ſo much as it was tendered for: Becauſe it was his Duty to have examined and told it, before he accepted thereof.

5 Rep. 115. 21. The Party, to whom ſome Money was tendered, had accepted it, and put it into his Purſe: But upon examining it, before he left the Place, he diſcovered ſome counterfeit Pieces, and for this Reaſon refuſed to carry it away. It was holden, that as he had not objected to the Money before he did accept it, he could not do this afterwards.

Eq. Caſ. Abr. 319. Auſtin v. The Executors of Dodwell. 22. A Tender of a Bank Note, as Money is not ſtrictly ſpeaking a good Tender: But if the Tenderer offer to get Money for the Note, this makes it a good Tender.

23. It ſeems reaſonable, that a Tender of any Sort of Goods ſhould, unleſs they are to be delivered according to ſome Sample, be made in a middling Kind of Goods of the Sort.

(C) At what Place a Tender muſt be made.

Bro. Tend. pl. 17. Bro. Cond. pl. 17. 1 Inſt. 210. Freem. 149. 1. IF a Contract be, that Money in Groſs, or Rent iſſuing out of Land, ſhall be paid, or that Goods ſhall be delivered, at a Place certain, a Tender can only be made at the Place.

Bro. Tend. pl. 17. 1 Inſt. 210. 2. If no Place be appointed for the Payment of Money in Groſs, a Tender muſt, if the Perſon to whom the Money is due be in *England*, be made at the Place where he is: But if he be out of *England*, the Party, who ought to pay the Money, is not bound to go out of the Realm to ſeek him.

1 Inſt. 210. 3. It was formerly holden, that the Money due upon a Mortgage, which is to be conſidered as Money in Groſs, muſt, if no Place be appointed for the Payment thereof, be tendered to the Perſon, if he be in *England*, at the Place where he is.

4. But it has been holden in the Court of Chancery, that a Tender to the Perſon is not in ſuch Caſe neceſſary.

1 Chan. Ca. 29. Manning v. Barges. 5. The Mortgagor, after the Mortgage was forfeited, went to the Mortgagee's Houſe with Money ſufficient to redeem the Eſtate, and tendered it there: But it did not appear that the Tender was to the Mortgagee, or that he was in the Houſe at the Time. This was holden to be a good Tender.

2 Will. 378. Gyles v. Hall. 6. Perſonal Notice was given to the Mortgagee the Day before the Twenty-fifth Day of *March* one Thouſand ſeven Hundred and Twenty-two that

that the Mortgagor would upon the twenty-fifth Day of *September* following, between the Hours of Ten and Twelve in the Forenoon, tender the principal Money, which was one thouſand Pounds, and all Intereſt due thereupon in *Lincoln's Inn Hall*, and a Tender was accordingly made. It was objected, that no Place being appointed in the Mortgage-Deed for the Payment of the Money, the Tender ought to have been made to the Mortgagee in Perſon: But the Tender was holden to be good. And by Lord *King* Chancellor—As the Money was lent in Town, and no Objection was made by the Mortgagee to the Place, when Notice of Payment was given, it would be very hard to compel the Mortgagor, to travel with ſo great a Sum of Money to the Place where the Mortgagee lives.

7. If no Place be appointed for the Payment of Rent iſſuing out of Land, a Tender upon the Land is good; for it is not in this Caſe neceſſary to make a Tender to the Perſon. 1 Inſt. 210. 211. Bro. Tend. pl. 18. pl. 38.

8. But although a Tender to the Perſon be not, in the Caſe of Rent iſſuing out of Land, neceſſary, a Tender to the Perſon would in ſuch Caſe be good. Cro. Eliz. 48. Crop *v.* Hamilton.

9. If a corporal Service to the Grantor be reſerved in a Grant of Land, this muſt be tendered to the Grantor in Perſon; and the Tenant muſt ſeek him if he be in *England*. 1 Inſt. 210, 211. Bro. Tend. pl. 17.

10. If no Place be appointed for the delivery of heavy Goods, the Perſon whoſe Duty it is to Deliver them is not bound to tender them to the Perſon to whom they ought to be delivered; for if he go to the Perſon to enquire at what Place he will receive them, and afterwards tender them at that Place, this is a good Tender. 1 Inſt. 210.

(D) At what Time a Tender muſt be made.

1. A Tender with Coſts may be made in a Court of Equity after a Bill is filed. Bunb. 28.

2. But a Tender cannot be made after an Action is commenced. Bro. Tend. pl. 9. 21 Jac. c. 16. ſ. 5.

3. In an Action of Treſpaſs the Defendant pleaded, that he tendered Amends before the Action was commenced, to wit, on the ſecond Day of *October*. The Plaintiff replied, that before the Tender he had ſued out a *Latitat*, *teſte* the laſt Day of the preceding *Trinity* Term, and had thereupon procured the Defendant to be arreſted. Upon a Demurrer this Tender was holden to be void: For that a Tender after the ſuing out of a *Latitat*, as well as one after the ſuing out of an original Writ, is void. Cro. Car. 264. Watts *v.* Baker.

4. But where a Tender has in Fact been made, before a Writ was ſued out, the Court, out of which the Writ iſſued, will upon Application take Care, that the Tender ſhall not be made void, by the Relation of the Writ to a Day anterior to the Tender.

5. The Defendant pleaded a Tender, upon the fourth Day of *May*, *ante diem exhibitionis Billæ*. The Plaintiff replied *non obtulit ante diem*; and, in order to ouſt the Defendant of the Benefit of the Tender, made up the Paper-Book with a general *Memorandum*. As by this Means the Writ would have related to the firſt Day of the Term, which was before the fourth Day of *May*, the Court of King's Bench, upon an Affidavit that the Writ was not ſued out till the ſixth Day of *May*, made a Rule, that the Plaintiff Str. 638. Smith *v.* Key.

ſhould

ſhould make up the Paper-Book with a ſpecial *Memorandum*, according to the Truth of the Fact.

2 Barn. 289. Hill *v.* Williams. 6. A Tender was pleaded to have been made upon the thirteenth Day of *January*. The Plaintiff replied an Original *teſte* the ſecond Day of *January*. Upon the Application of the Defendant, the Court of Chancery ordered the *Teſte* of the Original to be altered, from the ſecond Day of *January*, the common *teſte* Day of an Original returnable on the *Octave* of *St. Hilary*, to the ſixteenth Day of *January*, this being the Day upon which the Inſtructions for the Original were left with the Curſitor.

2 Inſt. 107. 8 Rep. 147. 7. In the Caſe of Damage feaſant, a Tender may be made before the Beaſts are diſtrained, or between the Time of diſtraining and impounding them.

Fitz.N.B.69. 1 Inſt. 107. 8 Rep. 147. 8. If the Tender be made before the Beaſts are diſtrained, the diſtraining of them afterwards is unlawful.

Fitz N.B.69. 1 Inſt. 107. 8 Rep. 147. 9. If it be made after the Diſtreſs, but before the Beaſts are impounded, the impounding of them afterwards is unlawful.

5 Rep. 76. Pilkington's Caſe. Cro. Eliz. 813. 8 Rep. 147. 10. A Tender after the Beaſts diſtrained are impounded is void: For as they are then *in Cuſtodia Legis*, the Perſon who diſtrained them has no Power to deliver them.

Lutw. 1262. Alwaies *v.* Brown. 11. If divers Beaſts are diſtrained, and any one of them be impounded before a Tender is made, the Tender is void.

8 Rep. 147. 12. After the Right of making a Diſtreſs has been tried in an Action of Replevin, the Plaintiff after Judgment for the Avowant, may tender the Damages; and if his Cattle are not thereupon delivered, he may maintain an Action of Detinue.

Cro.Eliz. 73. Allen *v.* Andrews. 13. In an Action of Debt upon a Bond, conditioned for the Payment of fourteen Pounds at a Place certain, upon *Michaelmas-Day* or within one Month after, the Defendant pleaded, that two Days before the End of the Month he tendered the Money at the Place, and that no Perſon was there to receive it. Upon a Demurrer this Tender was holden to be void. And by the Court—It would be hard, that a Tender when the Plaintiff was abſent ſhould be good; and to compel him to attend the whole Month would be very unreaſonable.

Plowd. 172, 173. Bro. Tend. pl. 41. 5 Rep. 114. 14. If Money is to be paid, or Goods are to be delivered, at a Place certain, upon or before a Day certain, a Tender cannot be made, before the laſt Day limited for the Payment or Delivery.

12 Mod. 421. Hammond *v.* Ouden. 15. In an Action of *Aſſumpſit* the Plaintiff declared, that in Conſideration of ſeventy Pounds by him paid to the Defendant, the Defendant promiſed to deliver certain Goods at a Place certain, upon or before the eighteenth Day of *January*, and the Plaintiff alledged, that the Goods were not delivered at the Place upon the eighteenth Day of *January*. After a Verdict for the Plaintiff it was objected, that the Breach of the Promiſe is not well alledged in this Declaration; it being only alledged, that the Goods were not delivered upon the eighteenth Day of *January*, whereas the Promiſe might have been well performed, by delivering them upon any Day before that Day: But the Declaration was holden to be good. And by the Court—The Defendant, as the eighteenth Day of *January* was the laſt Day limited for the Delivery of the Goods, could not have made a Tender upon any Day before, which would have been ſufficient to have excuſed his delivering them upon that Day.

16. Where

16. Where Money is to be paid, or Goods are to be delivered, at a Place certain, upon or before a Day certain, the Tender must not only be made upon the last Day limited for the Payment or Delivery, but it must also be made at the uttermost convenient Time of that Day; for as one Party has until the uttermost convenient Time of that Day to pay the Money, or deliver the Goods, it would be unreasonable, that the other should be obliged to attend for the receiving of the Money or Goods before that Time. 1 Inst. 211. Plowd. 172, 173. Bro. Tend. pl. 41. 5 Rep. 114.

17. But although the Party, who ought to pay Money, or deliver Goods, has until the uttermost convenient Time of the last Day limited for the Payment or Delivery, to pay the Money or deliver the Goods, a Tender is not good, unless there be, after it is made, Time enough, before the Sun sets, to examine and tell the Money, or to examine and take Account of the Goods: For if a Man should be compelled, to receive either Money or Goods in the Dark, there would be great Danger of his being imposed upon. Plowd. 173. 1 Inst. 202. 5 Rep. 114. 3 Lev. 104.

18. Notwithstanding the Law gives the uttermost convenient Time of the last Day, limited for the Payment of Money or Delivery of Goods, to pay the Money, or deliver the Goods; yet as this is solely for the Conveniency of both Parties, that neither may be obliged to give longer Attendance than is necessary, if it happen that both Parties meet at the Place at any other Time of the last Day, or upon any other Day within the Time limited for the Payment or Delivery, and a Tender be made, the Tender is good. 5 Rep. 114. 1 Inst. 202, 211. Cro. Eliz. 14.

19. And it has been doubted, whether, if the Party, who ought to pay Money or deliver Goods upon or before a Day certain, give notice to the Party to whom the Payment or Delivery ought to be made, that he will pay the Money, or deliver the Goods, upon some Day before the last Day limited for the Payment or Delivery, and afterwards make a Tender at the uttermost convenient Time of that Day, the Tender would not be good. 12 Mod. 422. Freem. 433.

20. If the Money, which is to be paid, or the Goods, which are to be delivered at a Day certain cannot, by Reason of a Circumstance that is not in the Power of either Party, be paid or delivered at the uttermost Time of that Day before the Sun sets, a Tender, at the uttermost convenient Time that such Payment or Delivery can on that Day be made, is good.

21. If the Contract be to transfer Stock upon a Day certain, a Tender of transferring may be made at the uttermost convenient Time of that Day, before the Books are shut; for as the Stock cannot be transferred after the Books are shut, a Tender, at the uttermost convenient Time of that Day before the Sun sets, would be quite nugatory. 12 Mod. 530, 533. Lancashire v. Killingworth.

22. It seems to have been formerly holden, that if the Contract be for transferring Stock at a Day certain, a Tender may be made at the uttermost convenient Time of that Day, before the usual Time of shutting the Books. Salk. 624. Lancashire v. Killingworth. 12 Mod. 533.

23. But the contrary has been since holden.

24. A Transfer of Stock was made at the uttermost convenient Time before One of the Clock, which was the usual Hour for shutting the Books: But the Party, who had contracted for the Stock, not being there to accept and pay for it, the Transfer was vacated before the Books were shut. As there was more Business that Day, than could be transacted in the Morning, the Books were opened again in the Afternoon; and divers Transfers were made. Upon the Trial of an Action, brought for the Money which was to have been paid on transferring the Stock, the Jury found for the Plaintiff: But a new Trial was granted. Upon the second Trial, which was at Bar, it was holden by the Court of King's Bench, that the Transfer was not a good Tender: For that the general Rule, which is that a Tender must be at the uttermost convenient Time of the Day, ought not Str. 777. Duke of Rutland v. Hodson. Raym. 688.

not to be broke through, except in a Caſe of Neceſſity; and that in the preſent Caſe there was no Neceſſity to break through it; becauſe, as the Books were opened again in the Afternoon, and the Defendant might have been then ready to accept and pay for the Stock, the Tender ought to have been made, at the uttermoſt convenient Time before the ſhutting of the Books in the Afternoon.

1 Inſt. 211. Dyer 354. 25. If Money is to be paid, or Goods are to be delivered, at a Place certain, Notice, although no Time be fixed for the Payment or Delivery, may be given to the Party to whom the Payment or Delivery is to be made, that the Money will be paid, or the Goods delivered, upon a Day therein mentioned; and a Tender at the uttermoſt convenient Time of that Day is good.

8 Rep. 92. Frances's Caſe. 26. If a Man be bound to pay twenty Pounds, ſome Time during his Life, at a Place certain, the Obligor cannot tender the Money whenever he pleaſes; for then the Obligee would be under a Neceſſity of perpetual Attendance: But if he give Notice to the Obligee, that upon a Day certain he will pay the Money, a Tender at the Place at the uttermoſt convenient Time of that Day is good.

1 Inſt. 202, 211. 5 Rep. 114. Cro. Eliz. 14. 27. Although no Time be fixed for the Payment of Money, or Delivery of Goods, at a Place certain, if the Party, who ought to pay the Money or deliver the Goods, accidently meet the Party, to whom the Payment or Delivery ought to be made, at any Time at the Place, he may then make a Tender.

(E) To whom Tender muſt be made.

1. A Tender may be made to any Perſon, in whom, either as a Party or Privy, the Right to the Thing tendered is.

Cro. Ja. 245. Ratcliff *v.* Davies. 4 Rep. 123. 2. A Tender to an Executor is good; becauſe the Right of his Teſtator to the Thing tendered, is devolved upon him as a Privy in Repreſentation.

Eq. Caſ. Abr. 39. Auſtin *v.* The Executors of Dodwell. 3. A Tender to an Executor, even before he has proved the Will of his Teſtator, is good, provided that he afterwards prove it; becauſe he thereby becomes an Executor *ab initio*.

Moor 37. Bro. Tend. pl. 1. 4. If a Bond be entered into, with Condition to pay Money to *J. S.* or his Aſſign, and the Bond is aſſigned, a Tender may be made to the Aſſignee; becauſe he is a Privy to the Condition.

1 Vent. 211. 5. *Hale* Ch. Juſtice ſeems to have been of Opinion, that if the Conuſee of a Statute-Merchant, after extending the Land, aſſign it over, a Tender to the Aſſignee is not good; for that the Tender ought to be made to the Conuſee.

Bro. Tend. pl. 38. 6. But in another Book it is laid down, that a Tender may in ſuch Caſe be made to the Aſſignee; and a Doubt is made, whether a Tender to the Conuſee after the Aſſignment would be good.

7. A Tender to a Stranger is not good.

Cro. Eliz. 755. Huiſh *v.* Phillips. 12 Mod. 441. Moor 37. 8. If the Condition of a Bond be to pay Money to a Stranger, a Tender to the Stranger will not ſave the Penalty.

9. But

9. But if a Bond be entered into by *A.* with Condition for the Payment of Money to *B.* to the Uſe of *C.* a Tender to *C.* is good; becauſe as the Obligation is for his Benefit, *C.* is not to be conſidered as a Stranger, but as a Truſtee for *B.* Cro. Eliz. 755. Huiſh *v.* Phillips.

10. It is laid down, that a Tender of Amends to a Bailiff, who has diſtrained Beaſts Damage-feaſant, is not good; becauſe, as he is only a Servant, he has no Power to deliver the Beaſts. 5 Rep. 76. Pilkington's Caſe. Paſch. 45. Eliz.

11. And the Authority of this Caſe has been recognized as Law in two ſubſequent Caſes. 1 Browl. 173. Roberts *v.* Young, Hil. 9 Ja. 1. Cro. Ja. 377. Wingfield *v.* Bell, Mich. 13 Ja. 1.

12. *Holt* Chief Juſtice did indeed, in a Caſe ſubſequent to theſe three Caſes, declare himſelf diſſatisfied with the Determination as to this Point in *Pilkington*'s Caſe. 12 Mod. 354. Horn *v.* Luines.

13. But it does not appear, that there has been any Determination contrary thereto.

(F) The Conſequences of a Tender and Refuſal.

1. A Tender by one Party, of paying a Debt or performing a Duty, and a Refuſal by the other to accept thereof, do in ſome Caſes amount to a Payment of the Debt or a Performance of the Duty.

2. But it will appear, that the Diſcharge is in ſuch Caſes an accidental and not a neceſſary Conſequence of the Tender and Refuſal; the Debt or Duty being diſcharged, becauſe the Caſes were ſo peculiarly circumſtanced, that there was not, after the Tender and Refuſal, any Remedy to enforce the Payment of the Debts or the Performance of the Duties.

3. If *A.* without any Debt or Duty preceding, infeoff *B.* of Land, with Condition for the Payment of a hundred Pounds to *B.* in the Nature of a Gratuity, and *A.* tender the Money to *B.* and *B.* refuſed to accept it, the Land is thereof diſcharged for ever: Becauſe, as the hundred Pounds is Collateral to the Land, *B.* has no Remedy for the Recovery thereof. 1 Inſt. 207.

4. If a ſingle Bond be entered into, for the Payment of twenty Pounds to the Obligee, and afterwards a Deed be made, that upon the Payment of ten Pounds, the Bond ſhall be void, and the Obligor tender the ten Pounds, and the Obligee refuſe to accept it, the Obligor is diſcharged for ever; for the Obligee, the ten Pounds being collateral to and not Parcel of the Sum mentioned therein, cannot recover it in an Action upon the Bond, and he has no Remedy to recover the Sum mentioned in the Deſeaſance. 1 Inſt. 207. 9 Rep. 79. Bro. Tout temps priſt, pl. 31. 2 Rol. Abr. 523. Cro. Eliz. 755.

5. If a Man enter into an Obligation, in the Penalty of a hundred Pounds, with Condition to perform an Award, or to do ſome other Thing for the Benefit of the Obligee, which it was not incumbent upon the Obligor to do at the Time of entering into the Obligation, a Tender by the Obligor of performing the Award, or of doing the other Thing, and a Refuſal by the Obligee to accept thereof, are a perpetual Bar to an Action upon the Obligation: For, as the Condition is ſatisfied by the Tender and Refuſal, the Penalty cannot be recovered; and as the performing of the Award or doing the other Thing, which it was not incumbent upon the Obligor to do at the Time of entering into it, could not be Parcel of the Obligation, no Action lies thereupon to compel the Performance of the Award, or the doing of the other Thing. 1 Inſt. 207. 209. Bro. Tout temps priſt, pl. 1. pl. 2. pl. 21. pl. 31. 9 Rep. 79. 2 Rol. Abr. 523. Cro. Eliz. 755. 1 Show. 129.

6. And

3 Lev. 24. Genne v. Tinker. Salk. 75.

6. And it would make no Difference, if, in the Caſe of an Obligation for performing of an Award to be made after the Obligation was entered into, the Payment of Money is awarded: For, if a Tender of the Sum awarded be made by the Obligor and refuſed by the Obligee, no Action lies upon the Obligation; the Money being in this Caſe no more Parcel thereof, than any other Thing, which might have been awarded, would have been.

7. But where an Obligation is entered into, for performing a Duty for the Benefit of a Stranger, the Obligor, although the Duty be collateral to and not Parcel of the Obligation, is not diſcharged by a Tender of performing the Duty and the Refuſal of the Stranger.

1 Inſt. 209. 5 Rep. 23.

8. If *A.* be bound in an Obligation to *B.* with Condition to infeoff *C.* and a Tender be made by *A.* of infeoffing *C.* and *C.* refuſe to be infeoffed, the Obligation is forfeited: For as the Obligor hath at his Peril taken upon himſelf to infeoff *C.* his Refuſal who is a Stranger does not ſatisfy the Condition, and conſequently an Action will lie upon the Bond.

1 Inſt. 209. Cro. Eliz. 755. Cro. Ja. 14.

9. But if *A.* enter into a Bond to *B.* with Condition to infeoff *C.* to the Uſe of *B.* and a Tender be made of infeoffing *C.* who refuſes to be infeoffed, the Obligation is ſaved: For, as the Act was in this Caſe to be done for the Benefit of *B.* *C.* is not to be conſidered as a Stranger, but as a Truſtee for *B.*

2 Roll. Abr. 524.

10. If the Condition of an Obligation be, that the Obligor ſhall pay a Sum of Money to the Obligee, in Purſuance of an Award made before the Obligation was entered into, a Tender and Refuſal of the Money awarded is no Diſcharge thereof: For, although the Condition of the Bond be thereby ſo far ſatisfied that the Penalty cannot be recovered, the Money awarded, which is in this Caſe Parcel of the Obligation, continues to be due, and may be recovered in an Action upon the Obligation.

1 Inſt 207. Bro. Tout, temps priſt, pl. 32. Salk. 597. Sty. 383.

11. In any Caſe however, where the Debt or Duty would not otherwiſe have been diſcharged by a Tender and Refuſal, if the Party to whom the Tender has been made take Iſſue upon the Tender, and it be found againſt him, the Debt or Duty is diſcharged; for it was at his Peril to take an Iſſue, by the finding of which his Refuſal is become Matter of Record.

12. Notwithſtanding the Party, who has made a Tender of paying a Debt or performing a Duty be not thereby diſcharged of the Debt or Duty, although the other Party refuſe to accept thereof, he is by the Tender and Refuſal diſcharged of the Damages, to which he would otherways have been liable, by Reaſon of the Non-payment of the Debt, or the Non-performance of the Duty.

1 Inſt. 209.

13 If *A.* borrowed a hundred Pounds of *B.* and afterwards mortgage Land to *B.* with Condition for the Payment thereof. In this Caſe, if *A.* tender the Money, and *B.* refuſe to accept thereof, the Land is diſcharged, and *B.* ſhall not be liable to Damages for Non-payment of the Debt; but the Debt, which exiſted before the Mortgage, remains, and may be recovered in an Action.

Bro. Tout temps priſt, pl. 24.

14 If a corporal Service be due from a Tenant to his Lord, a Tender of the Service by the Tenant, and a Refuſal by the Lord to accept thereof, are a Diſcharge of Damages for not having done it: But, as the Lord has the ſame Remedy to compel the doing of the Service, as he had before the Tender and Refuſal, it is not thereby diſcharged.

1 Inſt. 207. Bro. Tout temps priſt, pl. 31. 2 Roll. Abr. 523, 524. Salk. 623. Ld. Raym. 254.

15. If an Obligation be entered into in the Sum of twenty Pounds, with Condition for the Payment of ten Pounds, and the Obligor tender the ten Pounds, and the Obligee refuſe to accept it, the Obligor is diſcharged of Damages for Non-payment thereof: But an Action will ſtill lie upon the Obligation for the ten Pounds, it being Parcel of the Sum mentioned in the Obligation.

16. If

16. If the Money due upon a Mortgage carrying Intereſt be tendered to the Mortgagee, and he refuſe to accept thereof, the Mortgagor is diſcharged of Intereſt from the Time of making the Tender. 2 Freem. 174. Manning *v.* Burgeſs. 2 Chan. Ca. 206.

17. But in order to intitle a Mortgagor, in ſuch Caſe, to a Diſcharge of Intereſt, it muſt appear, that he has ever ſince the Tender and Refuſal kept the Money ready for paying off the Mortgage, and that no Profit has been made of it. 2 Will. 378. Gyles *v.* Hall. 2 Chan. Ca. 206.

18. A Right to Damages, on the Account of the Non-payment of a Debt or the Non-performance of a Duty, may, after being taken away by a Tender and Refuſal, be reſtored by a Demand ſubſequent to the Tender and Refuſal; for if the Debt or Duty be not diſcharged by the Tender and Refuſal, a new Right to Damages accrues, from the Non-payment or the Non-performance upon the ſubſequent Demand.

19. If *A.* have tendered a Sum of Money to *B.* and *B.* have refuſed to accept thereof: Yet if a Demand be afterwards made by *B.* and the Money be not paid, *A.* is liable to Damages for Non-payment from the Time of the Demand. 1 Brownl. 71.

20. A Diſtreſs may after a Tender and Refuſal be made for Rent in arrear; and in this Caſe a Demand ſubſequent to the Tender, and Refuſal is not neceſſary, the Diſtreſs itſelf being a Demand in Law. Hob. 207. Cranley *v.* Kingſwill.

21. If a Demand of a Sum of Money carrying Intereſt be made after a Tender and Refuſal to accept the ſame, and the Money be not thereupon paid, Intereſt begins again to grow due from the Time of the Demand.

22. It was formerly holden that, if a Man, in Conſequence of an Act to be done by him, would require a Right to a Debt or Duty, he does not acquire the Right, unleſs the Thing firſt to be done by him have been actually done.

23. *A.* by Indenture covenanted to pay a Sum of Money to *B.* and *B* covenanted by the ſame Indenture to execute, upon the Receipt thereof, a Releaſe of his Claim to certain Land. The Money being tendered by *A.* *B.* refuſed to accept it; and did not execute the Releaſe. An Action of Covenant was hereupon brought: But the Court were of Opinion that as *B.* was only bound to execute the Releaſe upon receiving the Money, and it had not in Fact been received by him, there was not a ſufficient Breach of Covenant to ground an Action upon. Sty 481. London *v.* Craven.

24. But the Law is now ſettled, that where a Man would upon doing a previous Act have acquired a Right to a Debt or Duty, this is as completely acquired, if he make a Tender of doing the previous Act, and the other Party refuſe to ſuffer it to be done, as if it had been actually done. Cro. Ja. 245. 2 Saund. 352. Salk. 75, 523. 12 Mod. 530. Ld. Raym. 964. Str. 777.

25. An Agreement was made, that *A.* ſhould pay a Sum of Money to *B.* and that *B.* ſhould, upon the Payment thereof, ſurrender a certain Leaſe to *A.* The Money was tendered by *A.* *B.* refuſed to accept thereof, and did not ſurrrender the Leaſe. An Action being hereupon brought, it was holden, that *A.* could as well maintain the Action againſt *B.* for not ſurrendering the Leaſe, as if the Money had been actually paid. Cro. Eliz. 889. Lea *v.* Exelby.

26. In an Action of Covenant the Plaintiff declared, that the Defendant had covenanted to accept a Transfer of one thouſand Pounds *Hudſon's-Bay* Stock, and upon the Transfer thereof to pay the Plaintiff two thouſand Pounds; and the Plaintiff averred, that he offered to Transfer the Stock, and that the Defendant did not come to accept or pay for the ſame. It was holden, upon a Demurrer to the Declaration, that the Plaintiff was as well intitled to the Money, as if he made an actual Transfer of the Stock. Ld. Raym. 686. Lancaſhire *v.* Killingworth.

(G) The

(G) The Conſequences of being ready to tender, when the Party, to whom it was intended to have been made, was not preſent.

1. THE Conſequences of a Tender and Refuſal have been treated of at large under the foregoing Head.

2. It is by no Means neceſſary, to recite any of the Caſes thereunder cited.

3 Nothing more is required under the preſent Head, than to obſerve, that every Conſequence, which would have followed from a Tender and Refuſal, will follow, from being ready to tender; in caſe the Perſon, whoſe Duty it was to be preſent at the Place, where the Tender was intended to have been made, neglected to be preſent.

4. If every ſuch Conſequence did not follow, it would frequently happen, that, notwithſtanding one Party has done all that was in his Power to make a Tender, all would be rendered ineffectual by the wilful Abſence of the other Party.

(H) Of pleading a Tender.

1. In the general.

Salk. 624. Lancaſhire v. Killingworth.

1. EVERY Requiſite, which is neceſſary to the Validity of a Tender muſt in pleading the Tender be ſhewn to have been complied with; elſe the Plea, for Want of ſhewing that the Party tendering has done all that was in his Power to pay the Debt or perform the Duty, is not good.

Cro. Ja. 423. Furſer v. Proud. Salk. 624.

2. A Plea of Tender at the Day was holden to be bad; becauſe it was not alledged, that the Tender was made at the uttermoſt convenient Time of the Day.

12 Mod 531. Lancaſhire v. Killingworth. Salk. 624. Ld. Raym. 688. Str. 777, 833.

3. In an Action of Covenant, for Money due upon a Contract for transferring Stock, the Plaintiff alledged, that he was ready at the Day and Place, and offered to transfer the Stock. The Declaration was holden to be inſufficient, for Want of ſhewing the Tender to have been made at the uttermoſt convenient Time of the Day that the Stock could have been accepted.

3 Lev. 104. Cole v. Walton. 2 Lev. 209. 12 Mod. 353. Noy 74.

4. In an Action of Debt for Rent the Defendant pleaded, that at the Day on which the Rent became due he was ready to pay it. The Plea was holden to be bad; becauſe it was not alledged, that he offered to pay the Rent; for it is the Tender, and not the being ready, which is traverſable.

Sid. 13. 2 Lev. 23. 2 Ventr. 109. Salk. 623. 12 Mod. 530. Ld. Raym. 687, 964.

5. If the Party, to whom a Tender was intended to have been made, was preſent at the Time of tendering, or if it do not appear from the Pleadings that he was abſent, it muſt be averred that there was a Refuſal; for the Refuſal as well as the Tender is traverſable.

6. An

6. An Agreement was, that the Plaintiff ſhould build a Houſe for the Defendant; and that the Defendant ſhould pay the Plaintiff a Sum of Money for his Labour in Building it. In an Action for the Money the Plaintiff averred, that he had made a Tender of building the Houſe; but he did not aver, that the Defendant had refuſed to ſuffer him to build it. It was holden, that the Declaration was inſufficient, for Want of ſhewing a Refuſal by the Defendant. 2 Saund. 352. Peeters v. Opie.

7. *A.* promiſed to pay a Sum of Money to *B.* at a Day and Place certain; and *B.* promiſed to ſurrender upon the Payment thereof a certain Leaſe to *A.* In an Action of *Aſſumpſit* brought by *A.* he alledged, that he had tendered the Money at the Day and Place; and that *B.* had not ſurrendered the Leaſe. All the Court held, that the Allegation of the Tender was ill; it not being enough for *A.* to ſay, that he tendered the Money: But he ought to have ſaid further, that the Defendant did not come to the Place, or that he refuſed to receive the Money. Cro. Eliz. 889. Lea v. Exelby.

8. But if the Party, to whom a Tender was intended to have been made at a Place certain, did not come to the Place, it is ſufficient for the Party, who intended to make a Tender, to alledge, that he was at the Place with Deſign to make a Tender; and that the other Party did not come to the Place. Ld. Raym. 687. Lancaſhire v. Killingworth. Cro. Eliz. 755. Salk. 623. 12 Mod. 530.

9. It was heretofore a Queſtion, whether it ought not in ſuch Caſe to be averred, that neither the Party nor any one for him did come to the Place, and in ſome Precedents the Averment is in this Manner. 12 Mod. 531. Cro. Eliz. 73. Cro. Ja. 423.

10. But it ſeems to be now ſettled, that it is in ſuch Caſe ſufficient to aver, that the Party did not come to the Place; for if any one lawfully authorized to receive the Thing intended to have been tendered had come, it would have been the ſame Thing, as if the Party had himſelf come. Cro. Eliz. 755. Huiſh v. Phillips. Cro. Ja. 14. 12 Mod. 531.

11. If the Debt or Duty be diſcharged by a Tender and Refuſal, the Plea of Tender ought to conclude with praying Judgment of the Action; for by the Tender and Refuſal the Action is in ſuch Caſe barred for ever. 1 Inſt. 207. 9 Rep. 79. Bro. Tout temps priſt, pl. 1. pl. 2. pl. 21. pl. 31. 2 Roll. Abr. 523. Cro. Eliz. 755. Carth. 143.

12. But if only Damages are diſcharged by a Tender and Refuſal, the Plea of Tender ought to conclude with praying Judgment of the Damages: Becauſe the Tender and Refuſal are in ſuch Caſe only a Bar of Damages. Ld. Raym. 254. 1 Inſt. 207. Bro. Tout temps priſt, pl. 24. pl 31. 2 Roll. Abr. 523. Salk. 623. Carth. 143.

13. As the Damages barred by a Tender and Refuſal are only thoſe which are occaſioned by the Non-payment of the Debt, or the Non-performance of the Duty, the Plea of Tender in an Action of *Aſſumpſit* muſt never conclude with praying Judgment of the Damages: For as this Action is only to recover Damages, a Plea in Bar of the Damages would in Effect be a Plea in Bar of the Action. The proper Way of pleading a Tender in an Action of *Aſſumpſit* is either to confeſs Damages to a certain Amount, and pray that the Plaintiff may proceed at his Peril for the Reſidue; or to bring a Sum of Money into Court, and pray Judgment *De ulterioribus Damnis.* Ld. Raym. 254. Gilea v. Hartis. Salk. 623.

14. It has been holden, that a Plea of Tender is an iſſuable Plea. 2 Barn. 296. Pay v. Dearſley.

15. But if a Judge's Order has, upon the Condition of pleading an iſſuable Plea, been obtained for time to plead, a Tender cannot be pleaded: this not being an iſſuable Plea within the Meaning of ſuch Order. Rep. of Pr. in C. B. 134. 1 Barn. 182, 246.

16. It

2 Barn. 291. Alderſon v. Dobbing. Mich. 22 G. 2.

16. It has been refuſed by the Court of Common Pleas, to ſuffer the General Iſſue and a Plea of Tender to be pleaded to the ſame Count; becauſe theſe two Pleas are contradictory.

2 Barn. 296. Pitfeld v. Morey. Trin. 26 G. 2.

17. But if there be two Counts, this Court will give Leave to plead a Tender to one Count, and the General Iſſue to the other.

1 Barn. 235. Reeves v. Probert.

18. A Motion being made, that the Defendant might withdraw his Plea of Tender, and plead the General Iſſue, it was denied. And by the Court —The ſuffering of this, as the Money pleaded to have been tendered is brought into Court, may be an Inconvenience to the Plaintiff.

2. Where *Uncore priſt* is pleaded.

Bro. Tout temps priſt, pl. 1. pl. 2. pl. 21. pl. 31. 2 Roll. Abr. 523. 1 Inſt. 207.

19. Wherever a Debt or Duty is diſcharged by a Tender and Refuſal, it is not neceſſary, in pleading the Tender, to plead *Uncore priſt*: Nay it would be ſtrange for a Party to ſay, he is ſtill ready to pay a Debt, or to perform a Duty, of which he is diſcharged.

Cro. Eliz. 755. 1 Show. 129.

Bro. Tout temps priſt, pl. 1. pl. 2. pl. 21. pl. 31. 1 Inſt. 207.

20. But where a Debt or Duty is not diſcharged by a Tender and Refuſal, it is not enough, for the Party who pleads the Tender, to plead a Tender and Refuſal, but he muſt alſo plead *Uncore priſt*.

2 Roll. Abr. 523. Cro. Eliz. 755. 1 Show. 129.

Bro. Tout temps priſt, pl. 24.

21. If any Service, which ought to have been done to a Lord at a Day certain, has been tendered at the Day, the Party who pleads this Tender muſt not only alledge, that he tendered the Service at the Day; but as the Service continues to be due, he muſt alſo plead that he is ſtill ready to do it.

1 Inſt. 207. Bro. Tout temps priſt, pl. 31. 2 Roll. Abr. 523, 534. Salk. 623.

22. In an Action of Debt upon a Bond, conditioned for the Payment of a leſſer Sum at a Day certain, a Plea of Tender at the Day is not good; for as the leſſer Sum ſtill remains due, the Defendant muſt further ſay that he is ſtill ready to pay it.

Ld. Raym. 254.

Sid. 30. Hobſon v. Rudge.

23. In an Action of Debt upon a Bond, the Condition was to pay Money at a Day certain, but no Place was appointed for the Payment. The Defendant pleaded, that the Plaintiff was not in *England* at the Day. This Plea was upon a Demurrer holden to be bad, for Want of pleading *Uncore priſt*.

2 Show. 143. Lea v. Garret.

24. In an Action of Debt upon Bond, with Condition to pay Money to the Adminiſtrators of the Obligee within two Months after his Deceaſe, the Defendant pleaded that he was ready to have paid it, but that no Letters of Adminiſtration were granted within two Months after the Deceaſe of the Obligee, and conſequently that there was no Adminiſtrator to receive it. Upon a Demurrer this Plea was holden to be bad; becauſe as the Debt was not diſcharged, the Defendant ought to have pleaded, that he is ſtill ready to pay it.

25. But

25. But if a Tender at the Day of Corn, or of any other Goods of a perishable Nature, be pleaded, with a Refusal, there is no need to plead *Uncore prist*; for as such Goods may have perished, and if they have not, as it might have been an Expence to keep them, it would be hard to compel a Party, to be ready at all Times after the Tender and Refusal to deliver them. 9 Rep. 79. Peyton's Case. 1 Inst. 207.

26. The Doctrine of this Case seems to apply to all Kinds of Goods which are bulky; for there must always be an Expence, in finding a Warehouse for such Goods.

27. *Uncore prist* may be pleaded after either a general or special Imparlance. Dyer 300. Sid. 364. 12 Mod. 8, 354. Ld. Raym. 254.

3. Where *Uncore prist* together with *Tout temps prist* is pleaded.

28. Wherever the Debt or Duty arises at the Time of the Contract, and is not discharged by a Tender and Refusal, it is not enough for the Party who pleads a Tender, to plead the Tender and Refusal with *Uncore prist*; but he must likewise plead *Tout temps prist*. Salk. 622, 623. 12 Mod. 152. Ld. Raym. 254. Comb. 444. Carth. 413.

29. In an Action of *Assumpsit*, for the Money due for Goods sold and delivered, the Defendant pleaded a Tender before the Action was brought, and that he is still ready to pay the Money. It was objected, that as the Money became due upon the Delivery of the Goods, the Defendant ought to have pleaded, that he has been at all Times from the Time of the Delivery and is still ready to pay the same. This was holden to be a material Objection. 10 Mod. 81. Whitlock v. Squire.

30. If the Defendant have pleaded *Tout temps prist*, the Plaintiff may reply a Demand between the Time of the Contract and the Tender, and shew the Time of making it; for he was not bound to alledge such special Demand in the Declaration. Ld. Raym. 254. Giles v. Hartis. Salk. 623. 12 Mod. 153.

31. A Defendant, after a *Nihil* had been returned to the Original, came at the *Capias*, and pleaded *Touts temps prist*. It was holden, that as it appeared from the Return of *Nihil*, that he had not Conusance of the Original, the Plea was good: But that if he had had Conusance of the Original he would, because he did not plead *Instanter*, have been estopped to plead *Tout temps prist*. Bro. Tout temps prist, pl. 30.

32. *Tout temps prist* may be pleaded after an Essoin cast; for, although this Plea be a Kind of Imparlance, as the Essoin may have been cast by a Stranger, it is not clear that the Defendant had Conusance of the Writ. 1 Inst. 131. Bro. Tout. temps prist, pl 20. pl. 36. 2 Roll. Abr. 523.

33. It is laid down in divers Books, that *Tout temps prist* cannot be pleaded after a general Imparlance by the Defendant. Bro. Tout temps prist, pl. 27. Salk. 622. 12 Mod. 8, 72, 84, 354. Freem. 205.

34. The Reason assigned in two Books, why the Defendant cannot plead *Tout temps prist* after a general Imparlance by him, seems to be very conclusive; namely, that after he has desired to imparl before he answers to the Declaration, it is a Contradiction to say, that he has been always ready to satisfy the Demand of the Plaintiff. 2 Mod. 62. Anon. Freem. 105.

35. But

1 Barn. 254. King *v.* Nichols. 2 Barn. 284.

35. But where a general Imparlance is given by the Plaintiff, the Court will, within the first four Days of the next Term, that he may have an Opportunity of pleading *Tout temps prist*, make a Rule for the Defendant to plead a Tender as of the preceding Term.

2 Barn. 288. Brown *v.* Hagan. 2 Barn. 279, 296.

36. And if after a general Imparlance given by the Plaintiff, the Declaration be delivered so short a Time before the Essoin Day of next Term, that the Defendant's Agent has not Time to write into the Country, and receive Instructions so as to move the Court within the first four Days of the next Term, the Court will, if the Application be as soon after the first four Days as it can conveniently be made, give Leave to plead a Tender as of the preceding Term.

37. It is not perhaps quite settled; but it seems to be the better Opinion, that *Tout temps prist* may be pleaded after a special Imparlance.

Freem. 134. Bone *v.* Andrews.

38. In an Action of *Assumpsit* the Defendant imparled specially, *Salvis omnibus Exceptionibus tam Brevi quam Narrationi*; and the Question was, whether *Tout temps prist* could be pleaded after this Imparlance? It was holden, that it might.

39. It is in the general true, that *Tout Temps prist* cannot be pleaded after a Demurrer.

40. But the Court will after a Demurrer, upon the particular Circumstances of the Case, give a Defendant Leave to plead as of a former Term, or compel a Plaintiff to declare as of a subsequent Term.

2 Barn. 291. Roberts *v.* Hughes.

41. A Declaration of *Hilary* Term being demurred to for Insufficiency, the Plaintiff obtained a Judge's Order to amend, and in the *Easter* Term following gave a Rule to plead. Hereupon the Defendant obtained a Rule, in order to have an Opportunity of pleading *Tout temps prist*, that he might plead as of the *Hilary* Term, or that the Plaintiff might make his Declaration as of the *Easter* Term.

4. Where a *Profert in Curia* is pleaded.

Bro. Tout temps prist, pl. 15. pl. 25. pl. 31. pl. 41. pl. 43. 2 Roll. Abr. 524. 12 Mod. 354. Ld. Raym. 83, 254, 643. 1 Barn. 181. Str. 638.

42. It is in the general true, that if a Debt or Duty be not discharged by a Tender and Refusal, the Tender must be pleaded with a *Profert in Curia:* For as the Debt or Duty continues, it is not enough for the Party, who pleads the Tender, to plead a Tender and Refusal with *Uncore prist*, or with *Uncore prist* together with *Tout temps prist*, as the Case may require; but he must also bring the Money, or other Thing which has been tendered, into Court, that the other Party may if he please accept thereof.

Ld. Raym. 643. Horn *v.* Lewin.

43. If a Defendant in an Action of Debt upon a Bond, with Condition for the Payment of a lesser Sum at a Day certain, plead a Tender with *Uncore prist*, the Plea is not good without bringing the Money into Court.

Bro. Tout temps prist, pl. 25. 12 Mod. 354.

44. So in an Action of Debt for Money due for Rent, if a Tender be pleaded with *Uncore prist* together with *Tout temps prist*, the Money must be brought into Court.

Bro. Tout temps prist, pl. 6. pl. 35.

45. It has indeed been holden, that if the Contract be to pay Money at a Place certain, it is not necessary, in Pleading a Tender, to bring the Money into Court; because the Party is not bound, to pay the Money at any other Place.

46. But

46. But it seems to be the better Opinion, that it is not sufficient for a Party to plead in such Case, that he is still ready to pay the Money at the Place, for that he ought to bring it into Court. Bro. Tout temps prist, pl. 43. 2 Roll. Abr. 524.

47. A Plea of Tender with a *Profert in Curia* is not good, unless the Money, or other Thing tendered, be in Fact brought into Court.

48. A Defendant had pleaded a Tender of Money with a *Profert in Curia:* But it appeared, that the Money was not brought into Court. It was holden, that the Plea was not good, and that the Plaintiff might sign Judgment. Str. 638. Pether v. Shelton.

49. If there are several Avowries, against several Tenants, for the same Rent-charge, it is not necessary for every Tenant, who pleads a Tender, to bring the Money into Court.

50. A Distress being made upon several Tenants for one Rent-charge issuing out of the Lands holden by them all, every one brought an Action of Replevin. As the Grantee of the Rent-charge made the same Avowry against them all, each Tenant pleaded in Bar of the Avowry against him a Tender with a *Profert in Curia*. The Court made a Rule, that the bringing in of Money upon one Avowry should be good as to all the Avowries. Ld. Raym. 429. Anon.

51. If the Thing, which has been tendered, be so heavy, that it cannot conveniently be brought into Court, it is not necessary to plead a Tender with a *Profert in Curia*. Bro. Tout temps prist, pl. 3. 2 Roll. Abr. 524. 1 Barn. 200.

52. It must however in such Case be alledged, that the Thing cannot, by Reason of its Weight, conveniently be brought into Court. Bro. Tout temps prist, pl. 3. 2 Roll. Abr. 524.

(I) The Consequences of a Profert in Curia.

1. IT is in the general true, that if the Money, or other Thing which has been tendered, be upon pleading the Tender brought into Court, the Plaintiff is intitled thereto, although he should afterwards be nonsuited, or there should be a Verdict against him.

2. In an Action of *Assumpsit* the Defendant pleaded a Tender, and brought four Guineas into Court. The Plaintiff replied a Demand and Refusal subsequent to the Tender. Issue being thereupon joined, it was found for the Defendant. The Defendant afterwards moved to take the Money out of Court; but it was refused And by the Court—He has admitted that this Money was due to the Plaintiff, and he is no more intitled to have it again, than if it had been brought into Court upon the common Rule, and stricken out of the Declaration. Str. 1017. Cox v. Robinson.

3. There is perhaps no Case of Nonsuit, which is expressly to this Point.

4. But it is laid down, that, if after Money has been brought into Court upon the common Rule, the Plaintiff be nonsuited, he is intitled to the Money; and it seems as reasonable, that the Plaintiff should be intitled to it, after having been nonsuited in the Case of a Tender with a *Profert in Curia*, as in the Case of bringing in Money upon the common Rule. Salk. 597. Elliot v. Callow. Rep. of Pr. in C. B. 36.

1 Inſt. 207. Bro. Tout temps priſt, pl. 32. Sty. 388. Salk. 597.

5. If the Plaintiff take Iſſue upon the Tender, and it be found againſt him, the Defendant ſhall have the Money again; for it was at the Plaintiff's Peril to take an Iſſue, by the finding of which his Refuſal is become Matter of Record.

6. In any Caſe, wherein the Plaintiff is intitled to the Money, or other Thing, which has upon a Plea of Tender been brought into Court, he muſt, in Caſe he does take it out of Court, pay the Defendant Coſts.

7. If a Plaintiff have proceeded in his Suit, after Money was brought into Court upon a Plea of Tender, he cannot afterwards take the Money out of Court, without the Leave of the Court.

2 Barn. 289. Hill *v.* Williams.

8. The Plaintiff, after replying to a Plea of Tender, took the Money which had been brought in, out of Court, and entered an Acquittal. It was holden, that as the Replication amounted to a Refuſal of accepting the Money, the Plaintiff could not afterwards take it out of Court, and enter an Acquittal, without Leave of the Court.

2 Barn. 289, 290.

9. But the Court will always give a Plaintiff Leave, to do this upon paying the Defendant Coſts.

Cro. Ja. 126. Ld. Raym. 643, 774.

10. If the Plaintiff take the Money, or other Thing which has been brought in, out of Court, he cannot afterwards proceed for Damages, on the Account of a Demand and Refuſal ſubſequent to the Tender: For as the Judgment, which ought in ſuch Caſe to be entered up, is *quod* the Defendant *eat inde ſine Die*, the Plaintiff is barred from having Judgment of the Principal; and a Man cannot proceed for Damages merely acceſſary, after being barred of the Principal, in any Action except an Ejectment, wherein the Term expires pending the Action.

(K) Of bringing Money into Court upon the Common Rule.

1. MONEY cannot be brought into Court upon the common Rule, without Leave of the Court.

2. The Practice, of giving Leave to bring Money into Court upon the common Rule, is not very antient.

Salk. 597.

3. *Holt* Chief Juſtice is reported to have ſaid, that he remembered the Time, when Motions for Leave to do this were firſt made.

Str. 787. White *v.* Woodhouſe.

4. The Practice was introduced, for the Sake of giving a Party, who had never had it in his Power to make a Tender, or had neglected to make one, an Opportunity of ſatisfying the Debt for which an Action had been commenced; and likewiſe to deliver him from the Difficulty of pleading the Tender, if he had made one.

Bunb. 28, 47.

5. Money cannot be brought into a Court of Equity, but a Tender may be relied upon in the Anſwer to a Bill in Equity.

6. The Sum of Money, which is to be brought into Court upon the common Rule, is always mentioned in the Rule.

7. Money cannot be brought into Court upon the common Rule after the Defendant has pleaded.

8. If a Party have obtained the common Rule to bring a certain Sum of Money into Court, the Court will not give him Leave, after having pleaded, to bring in more Money than is mentioned in the Rule.

2 Barn. 233. Green *v.* Beaton.

9. A Defendant, who had obtained the common Rule to bring Seventy-nine Pounds and one Shilling into Court, afterwards moved for Leave to bring

bring in one Pound and four Shillings more: But it appearing that he had pleaded, the Court refuſed to give Leave to do this.

10. A Defendant, who had obtained the common Rule for bringing Money into Court, brought the Sum therein mentioned into Court. The Plaintiff refuſed to accept thereof; and Iſſue was joined in the Action. Afterwards the Defendant applied for another Rule, to make an Addition to the Sum brought in. No Rule was granted. And by the Court—This was a Subterfuge of the Defendant, to try if the Plaintiff would accept leſs than is due, and as this would not do, he now wants to bring more Money into Court, which the Court never gives Leave to do after Iſſue is joined in an Action. 1 Barn. 102. Swan v. Freeman.

11. If there are three Counts in a Declaration, the Defendant may have a Rule to bring Money into Court upon one, and plead to the other two. 1 Barn. 232. Hellier v. Hallet.

12. But he cannot in ſuch Caſe have a Rule, to bring Money into Court upon one Count, to plead to another, and to demur to the third. Rep. of Pract. in C. B. 48.

13. The common Rule for bringing Money into Court is very ſeldom granted, without annexing the Condition of paying Coſts.

14. But as the old Form of the common Rule for bringing Money into Court is not compulſory, as to the Payment of Coſts, in Caſe the Plaintiff ſhall think proper to accept the Money, the Court of King's Bench, in which Court the old Form is ſtill adhered to, will not grant an Attachment for the Non-payment of Coſts.

15. In an Action of *Aſſumpſit* the Defendant brought eight Pounds into Court, upon the common Rule. The Plaintiff took it out, and after taxing Coſts demanded them. As theſe were not paid, he went on to Trial, and obtained a Verdict for ſeven Pounds eighteen Shillings. It was inſiſted, that as the Plaintiff was over-paid by the Money taken out of Court, he ought not to have Coſts of the Proceedings ſubſequent to the bringing of it in: But the Court held, that this Caſe was to be conſidered, the Terms of the Rule not having been complied with, as if no Rule had been made; and that in ſuch Caſe it is not uſual to grant an Attachment, but the Plaintiff, as the Rule is only a conditional one, may go on. The *Poſtea* was ordered to be delivered to the Plaintiff: But it was ordered, that he ſhould upon taking out Execution deduct for the Money he had taken out of Court. Str. 1220. Hand. v. Dinely.

16. The old Form, of the common Rule for bringing Money into Court, having been adjudged by the Court of Common Pleas defective, for Want of being compulſory upon the Defendant as to the Payment of Coſts, in Caſe the Plaintiff ſhall think proper to accept the Money, it has been of late Years altered, ſo as to be compulſory; and conſequently, an Attachment againſt the Defendant may be had in that Court, if the Coſts are not paid. 2 Barn. 227.

17. A Caſe may be ſo circumſtanced, that the Court will give Leave to bring Money into Court upon the common Rule, without annexing the Condition of paying Coſts, in Caſe the Plaintiff ſhall think proper to accept the Money.

18. In an Action of Debt for Rent it appeared, that there had been a Tender of the Rent before it was due; that the Plaintiff had kept out of the Way all the Day on which it did become due, in order to deprive the Defendant of an Opportunity of tendering the Rent that Day; and that the Action was commenced the next Day. The Defendant, who had before obtained the common Rule to bring Money into Court with Coſts, in Caſe the Plaintiff ſhall think proper to accept the Money, afterwards obtained another Rule, that the Plaintiff might inſtead of receiving Coſts pay the Defendants Coſts. The latter Rule was afterwards diſcharged. But ſo much of the former Rule as related to Coſts, was diſcharged likewiſe. MS. Rep. Johnſon v. Holditch Eaſt. 31 Geo. 2. in K. B. 1 Bur. 578. S. C.

19. And by Lord *Mansfield* Chief Juſtice—Upon the particular Circumſtances of a Caſe, the Court has a Power, although the general Rule

be otherwiſe, to give Leave to bring Money into Court upon the common Rule without Coſts; and the preſent, wherein the Plaintiff kept out of the Way on purpoſe to avoid a Tender of the Rent, is a proper Caſe to give ſuch Leave in. It is in the general of Courſe to allow Coſts, where Leave is given to amend: But the Court may, upon the particular Circumſtances of a Caſe, give Leave to amend without Coſts.

20. And by *Denniſon* Juſtice—The Court has certainly a Power, where The Juſtice of a particular Caſe requires it, to diſpenſe with a Part of one of its Rules, which can only be adapted to general Caſes.

21. And by *Foſter* Juſtice—There is perhaps no Caſe, where Coſts are more generally given, than upon the granting of a new Trial; and yet a Caſe may be ſo circumſtanced, as to make it proper for the Court to grant a new Trial, without annexing the Condition of paying the Coſts of the former Trial.

22. And by *Wilmot* Juſtice—The Circumſtances of this Caſe are ſo peculiarly hard, that the Court ought to go as far as by the Rules of Law it can in granting Relief. If the firſt Application had been for Leave to bring Money into Court upon the common Rule, without Coſts, I ſhould have been for giving it; and I ſee no Reaſon why it ſhould not be now given.

(L) At what Time Money may be brought into Court upon the common Rule.

7 Mod. 140. Anon.

1. A Defendant is not ſo in Court, until Bail is put in, as to be able to move for Leave to bring Money into Court upon the common Rule.

2. The Court will in ſome Caſes give a Defendant Leave to withdraw his Demurrer, and bring Money into Court upon the common Rule.

2 Barn. 134. Littlehale v. Boſanquet.

3. The Defendant having demurred to the Declaration, and aſſigned for Cauſe the Want of Pledges, the Plaintiff joined in Demurrer. The Defendant afterwards moved for Leave to withdraw his Demurrer, and to bring Money into Court upon the common Rule, which was granted.

1 Barn. 197. Anon. Ld. Raym. 398.

4. Money may be brought into Court upon the common Rule, at any Time before the Defendant has pleaded, although the Rule for pleading be out.

5. The general Rule is, that although a Defendant have obtained the common Rule for bringing Money into Court, he cannot bring the Money in after he has pleaded.

1 Barn. 200. Straphon v. Thompſon. Hil. 11G. 2.

6. The common Rule for bringing Money into Court was diſcharged, becauſe the Defendant did not bring in the Money before he pleaded.

2 Barn. 275. Salmon v. Aldrich, Hil. 16G. 2.

7. A Motion being made, for Leave to withdraw a Plea of Tender, and to bring Money into Court upon the common Rule, and plead the general Iſſue, it was refuſed. And by the Court—We never make a Rule for bringing Money into Court, after the Defendant has pleaded, without the Conſent of the Plaintiff

8. But the Court will ſometimes give Leave to withdraw a Plea, and bring Money into Court upon the common Rule.

1 Barn. 256. Uſher v. Edmunds, Mich. 13G. 2.

9. A Motion was made for Leave to withdraw the General Iſſue, and after bringing Money into Court upon the common Rule to plead the ſame *de novo*, the Defendant's Attorney being dead, before Leave was moved

moved for, as his Client had desired it might be, for bringing in Money, and the Attorney's Clerk having delivered the Plea by Mistake. Leave was afterwards given. And by the Court—The general Rule is against giving Leave to do this: But in a Case like the present, the general Rule ought to be dispensed with.

10. Since this Case, which seems to have been determined upon the particular Circumstances thereof, the Practice has been, to give Leave to withdraw a Plea, and bring Money into Court upon the common Rule, although there be no particular Circumstance in the Case.

11. The Court of King's Bench granted a Rule to withdraw the Plea of the General Issue, in order to give the Defendant an Opportunity of bringing Money into Court upon the common Rule. Str. 1271. Tarlton v. Wragg, Trin. 21 G. 2.

12. And a Rule of the same Kind has been granted in the Court of Common Pleas. 2 Barn. Suppl 43. Phillips v. Barker, Hil. 29 G. 2.

13. But whenever such a Rule is granted, the Court will take care that the Plaintiff shall not be thereby delayed; and in order to prevent this, it is, wherever the Case requires it, made a part of the Rule, that the Defendant shall take short Notice of Trial. Str. 1271. 2 Barn. Suppl. 43.

14. Money cannot be brought into Court upon the common Rule, after a Judgment has been regularly signed. 2 Barn. 232. Rep. of Pr. in C. B. 65.

15. After a regular Judgment had been set aside, upon the usual Terms of payings Costs, and pleading the general Issue, the Court was moved, for Leave to bring Money into Court upon the common Rule. No Rule was made. And by the Court—Leave is never given to bring Money into Court upon the common Rule, after a Judgment has been regularly signed. 1 Barn. 200. Burgess v. Pollamounter.

(M) Of pleading where Money has been brought into Court upon the Common Rule.

1. IT has been holden, that a Defendant, who has obtained the common Rule for bringing Money into Court, can only plead the General Issue.

2. After Money had been brought into Court upon the common Rule, the Defendant obtained a Rule to plead double, *Non assumpsit* and *Non assumpsit infra sex Annos*. The Plea was afterwards set aside. And by the Court—A Defendant can in such Case only plead the General Issue. 1 Barn. 248, 249. Buck v. Warren, East. 10 G. 2.

3. But the contrary has been since holden.

4. In an Action upon the Case, wherein Money had been brought into Court upon the common Rule, Leave was given to plead the General Issue, the Statute of Limitation, and a Sett-off. 2 Barn. 232. Hellier v. Hallet, Trin 21 G. 2.

5. After an Executor had obtained the common Rule for bringing Money into Court, Leave was given to plead *Plene administravit* together with the General Issue. 2 Barn. 234. Austin v. Ross, Hil. 23 G. 2.

6. It is in the General true, that the Defendant cannot bring Money into Court upon the common Rule, as to Part of the Plaintiff's Demand in one Count, and plead as to the Residue of the Demand.

7. In

12 Mod. 90. Burman v. Shepherd. Comb. 357.

7. In an Action of Trover for a Bill of Exchange for a hundred Pounds the Defendant moved for Leave to bring fifty Pounds into Court, and have that Sum ſtricken out of the Declaration; and to plead Not guilty as to the Reſidue. No Rule was made. And by *Holt* Chief Juſtice—It may happen, that the Plaintiff has a good Cauſe of Action for Part of his Demand, and a probable one for the Reſidue; in which Caſe it would be very hard, to ſtrike the former out of the Declaration, and put him to try the latter at the Peril of Coſts.

12 Mod. 95. Pawlet v. Heatfield.

8. In an Action of Covenant ſeveral Breaches were aſſigned, one of which was the Non-payment of Rent. The Court was moved, that upon bringing ten Pounds into Court, the Breach, as to the Non-payment of Rent, might be ſtricken out of the Declaration, and that the Defendant might plead as to the Reſidue. No Rule was made And by the Court—Whenever it appears that the Plaintiff has a Juſt Cauſe of Action as to one Thing, we will not put him to try another at the Peril of Coſts.

9. But if there are two or more Counts in a Declaration, the Defendant may have the common Rule to bring Money into Court as to one or more of them, and to plead as to the other or others.

2 Barn. 232. Hellier v. Hallet.

10. In an Action upon the Caſe, wherein there were nine Counts, the Defendant obtained the common Rule to bring Money into Court upon two of them, and had Leave to plead the General Iſſue, the Statute of Limitation, and a Set-off, as to the others.

Rep. of Pract. in C. B. 48. Thames v. Oſey.

11. If a Defendant have obtained the common Rule for bringing Money into Court upon one Count, he cannot demur to any other Count in the Declaration; for the Deſign, of permitting Money to be brought into Court, is to put an End to the Cauſe.

2 Barn 232. Hellier v. Hallet.

12. If the Plaintiff, where the common Rule for bringing in Money upon ſome Counts in a Declaration has been made, think proper to accept the Money, he is intitled to Coſts upon all the Counts.

(N) The Conſequences of bringing Money into Court upon the common Rule.

1. WHENEVER Leave is given to bring Money into Court upon the common Rule, Part of the Rule is, that unleſs the Plaintiff ſhall accept thereof together with Coſts to the Time of bringing it in, in full Diſcharge of the Action, the ſaid Money to be paid to the Plaintiff, and to be ſtricken out of the Declaration; and upon the Trial of the Iſſue the Plaintiff ſhall not be permitted to give any Evidence as to the ſaid Money.

2. A Plaintiff is in almoſt all Caſes intitled to the Money brought into Court upon the common Rule.

Salk. 597. Elliot v. Callow. Rep. of Pr. in C. B. 30.

3. After ten Pounds had been brought into Court upon the common Rule the Plaintiff was nonſuited. A Queſtion hereupon aroſe, Whether the Plaintiff was intitled to have the Money out of Court? It was holden that he was. And by the Court—So much the Defendant has by bringing it into Court admitted to be due.

2 Barn. 230. Fiſher v. Kitchinham.

4. Upon a Motion in Arreſt of Judgment the Judgment was arreſted; yet the Court ordered that a Sum of Money, which had been brought into Court upon the common Rule, ſhould be paid to the Plaintiff.

5. But

5. But if a Suit abate by the Death of the Plaintiff, the Court has not yet gone ſo far, as to order the Money, which had been brought into Court upon the common Rule, to be paid to his Executor. 1 Barn. 199. Crockay v. Marton. 2 Barn. Suppl. 40.

6. As the Court will not however, even in ſuch Caſe, order the Money, which was brought into Court to the Plaintiff's Uſe, to be paid out again to the Defendant, the prudenteſt Way is, for the Defendant to conſent, that, upon an Undertaking by the Executor of the Plaintiff not to bring another Action for the ſame Cauſe, the Money may be paid to him: For if a new Action be brought by the Executor, the Defendant muſt apply to have the Money, which is in Court, transferred for Payment in this Action, and muſt pay Coſts therein. 1 Barn 199. 2 Barn. Suppl. 41.

7. Although a Plaintiff has proceeded in his Suit after the bringing in of Money upon the common Rule, he may afterwards have a Rule to ſtay his own Proceedings, and take the Money out of Court. 1 Barn. 198, 201. 2 Barn. 230, 235.

8. The Defendant had brought Money into Court upon the common Rule. The Plaintiff, refuſing to accept thereof, delivered an Iſſue with Notice of Trial for the next Aſſizes: But he afterwards countermanded the ſame. In the next Term the Defendant ſerved him with a Rule, to enter the Iſſue upon Record. Hereupon a Rule was made, that the Plaintiff might take the Money out of Court, with Coſts to the Time of bringing it in. 2 Barn. 235. Bate v. Crane.

9. But whenever ſuch a Rule is made, the Plaintiff muſt pay the Defendant his Coſts ſubſequent to the Time of bringing the Money into Court; and it is uſual to make it Part of the Rule, that ſuch Coſts ſhall be paid out of the Money which has been brought in; and if the Money in Court be not ſufficient for this Purpoſe, that the Plaintiff ſhall make good the Deficiency. 1 Barn. 98. 201. 2 Barn. 230, 235.

10. If Money has, in an Action againſt an Executor, been brought into Court upon the common Rule, and the Plaintiff be afterwards nonſuited, or there be a Verdict againſt him, the Defendant ſhall have the Money out of Court again; becauſe, being an Executor, he might not know, whether his Teſtator was indebted to the Plaintiff or not. Rep. of Pr. in C. B. 5. Anon.

11. A Defendant, who has brought Money into Court upon the common Rule, is not intitled to have it out of Court again, although there be a Verdict for him: For he has admitted the Sum brought in to be due to the Plaintiff, and ſo much has been ſtricken out of the Declaration. Str. 1027. Box v. Robinſon, Rep. of Pr. in C. B. 5.

12. If a Suit abate, after Money has been brought into Court upon the common Rule, by the Death of the Defendant, his Executor is not intitled to have the Money out of Court again.

13. Although the Plaintiff is intitled to the Money, which has been brought into Court upon the common Rule, it is uſual for the Court, if there be a Verdict for the Defendant, to order it, provided the Sum do not exceed what is due to the Defendant for Coſts, to be paid to him on Account thereof. 1 Barn. 199. Anon. Rep. of Pr. in C. B. 54.

14. A Motion was made upon an Affidavit that the Defendant was dead, to have ten Pounds, which had been brought into Court by him upon the common Rule, paid out of Court to his Executor: But it was denied. 1 Barn. 197. Knapton v. Drew.

(O) In what Cases a Tender may in the general be made, or Money may be brought into Court upon the common Rule.

1. HITHERTO Tender and bringing Money into Court upon the common Rule have had a distinct Consideration: But it may be as well to treat of them, under this and the following Head, jointly: Because the greater Part of the Matter, which falls properly under these two Heads, is so blended in the Books, that it cannot, without some Difficulty and much Repetition, be separated; and perhaps the Separation would not in the least tend to the Illustration of either Subject.

2. It is in general true, that whenever one Person has a Right to a certain Debt or Duty from another, a Tender may be made.

3. This might be illustrated by an Infinity of Cases: But the Reason of the Thing; namely, that it should not be in the Power of one Man to vex another, by suing for a certain Debt or Duty which the other has offered to satisfy, speaks so strongly, as to make it unnecessary to adduce any.

4. It will moreover in treating of Tender in particular Actions appear, that in almost every Instance where a Tender cannot be made, it is owing to the Uncertainty of the Debt or Duty, that it cannot in such Instance be made.

5. But although a Tender may be made in every Case wherein the Debt or Duty is certain, it is not necessary to make one in every such Case.

Bro. Tend. pl. 22. 7 Rep. 28. Hob 207. 12 Mod. 414.

6. If the Obligation precede the Duty, as where a Bond is with Condition to pay a Sum of Money, or an Annuity, neither of which was before due, a Tender must to save the Penalty of the Bond be made: But if the Duty precede the Obligation, as where a Bond is with Condition to pay a Rent-charge, which was before due, no Tender is necessary; for it is sufficient, that the Party be ready to pay this when it is demanded upon the Land.

Leon. 17. Fringe v. Lewes. 12 Mod. 414.

7. So if an Executor enter into a Bond, with Condition to perform a Will, he is not thereby bound to tender a Legacy given by the Will: But the Legacy remains as it was before payable upon Request.

8. In almost every Action, wherein a Tender might before it was commenced have been made, Money may be brought into Court upon the common Rule.

6 Mod. 29. Anon. Salk. 596. 1 Barn. 198.

9. It was formerly holden, that Money could not be brought into Court upon the common Rule, in an Action wherein an Executor or Administrator was Plaintiff; because neither of these is liable to Costs.

1 Barn. 197. Bryan v. Holloway.

10. Afterwards the Practice was, in an Action brought by an Executor or Administrator, to make a Rule upon the Plaintiff, to shew Cause why he should not accept the Debt and Costs.

Str. 769. Cruchfield v. Scot.

11. But it has since been holden, that Money may be brought into Court upon the common Rule, where an Executor or Administrator is Plaintiff; for that, although the Plaintiff cannot be thereby made liable to pay Costs, he ought to be prevented from obtaining Costs, subsequent to the Time of bringing in the Money.

12. The common Rule for bringing Money into Court, may be had in some Cases where no Tender could have been made.

13. If a Sum of Money be given, as a Penalty, by a Statute to any Person who will sue for the same, an Offender against the Statute is liable to pay the Money to the Person who does sue for it: But no Tender could have

have been made in this Caſe; becauſe a Tender can never be made after an Action is commenced, and it could not be known, until the Action was commenced, that the Offender would have been liable to pay the Money to the Perſon who has brought the Action.

14. But the Court will, after an Action is commenced for a Sum of Money, given as a Penalty by a Statute, give Leave to bring Money into Court upon the common Rule. Str. 1217. Webb quitam *v.* Poulter.

(P) Of tendering and bringing Money into Court upon the Common Rule in particular Actions.

1. In an Action of *Aſſumpſit*.

1. IT is in the general true, that Money cannot be brought into Court upon the common Rule in an Action of *Aſſumpſit*: Becauſe the Damages, which may be recovered in ſuch Action, are for the moſt Part uncertain.

2. In an Action of *Aſſumpſit* againſt a Maſter of a Ship, for Damages ſuſtained by his not delivering ſome Jars of Oil ſafe, and in as good Condition as he received them, a Motion was made for Leave to bring Money into Court upon the common Rule, at the Rate of Sixpence *per* Jar. No Rule was made. And by Lord *Mansfield* Chief Juſtice.—Wherever in an Action of *Aſſumpſit*, the Damages are as in the preſent Caſe uncertain, the Court never gives Leave to bring Money into Court upon the common Rule. MS. Rep. Eaſt. 30 G. 2. Buckholden *v.* Hampton.

3. It is laid down in one Caſe, that Money may be brought into Court upon the common Rule in an Action of *Aſſumpſit* upon a Count for a *Mutuatus*. 7 Mod. 141. Anon. Hil. 1 Ann.

4. But in a latter Caſe, where an Action was brought upon a Bill penal, and a Count was added for a *Mutuatus*, it was holden, that Money could not be brought into Court upon the common Rule upon this Count. 2 Barn. 228. Pierce *v.* Saunders, Eaſt. 14 G. 2.

5. It was formerly holden, that no Tender could be made in an Action of *Aſſumpſit* upon a Count for a *Quantum meruit*, by Reaſon of the Uncertainty of the Damages which may on ſuch Count be recovered. Ld. Raym. 255. Gyles *v.* Hartis.

6. A Motion being made, for Leave to bring Money into Court upon the common Rule, in an Action of *Aſſumpſit* wherein there was one Count upon an *Indebitatus Aſſumpſit*, and another upon a *Quantum meruit*, the Court gave Leave to do it as to the former Count, but not as to the latter. And by the Court—Who can tell what a Man deſerves till it be tried? 12 Mod. 187. Smith *v.* Johnſon.

7. But it has been ſince holden, that a Tender may be made in an Action of *Aſſumpſit* upon a Count for a *Quantum meruit*; and it follows of Courſe, that Money may now be brought into Court in an Action of *Aſſumpſit* upon a Count for a *Quantum meruit*. Str. 576. Johnſon *v.* Lancaſter.

8. A Tender may be made in all Caſes in an Action of *Aſſumpſit* upon a Count for an *Indebitatus Aſſumpſit*; becauſe the Damages which may be recovered on ſuch Count are always certain. Salk. 23. Hard's Caſe. Salk. 597. 6 Mod. 128.

2. In an Action upon the Caſe.

9. Money cannot be brought into Court upon the common Rule in an Action upon the Caſe; becauſe the Damages which may be recovered in this Action are uncertain.

Str. 787. White *v.* Woodhouſe.

10. It has been holden, that Money cannot be brought into Court upon the common Rule, in Action upon the Caſe for immoderately driving a hired Chaiſe.

Str. 906. Squire *v.* Archer.

11. In an Action upon the Caſe for Dilapidations, the Court refuſed to let Money be brought in upon the common Rule.

12. By the 11 *G.* 2. *c.* 19. *par.* 20. a Tender may be made, before the Commencement of an Action upon the Caſe, for any unlawful Act done by a Perſon who has diſtrained for Rent juſtly due.

13. By the 17 *G.* 2. *c.* 38. *par.* 10. a Tender may be made, before the Commencement of an Action upon the Caſe, for any Irregularity in diſtraining for Money juſtly due for the Relief of the Poor.

3. In an Action of Covenant.

1 Ventr. 356. Anon. 1 Show. 130.

14. It is in the general true, that Money cannot be brought into Court upon the common Rule in an Action of Covenant; becauſe this Action does in the general ſound in Damages.

11 Mod. 270. Anon. Salk. 596.

15. In an Action of Covenant for not doing Repairs it was holden, that Money could not be brought into Court upon the common Rule, the Demand being in ſuch Caſe uncertain.

16. But wherever the Damages ſuſtained by the Breach of Covenant aſſigned are certain, Money may be brought into Court upon the common Rule.

Salk. 596. Anon.

17. If the Breach aſſigned in Action of Covenant be Non-payment of Rent, Money may be brought into Court upon the common Rule: The Demand being in ſuch Caſe certain.

2 Barn. 229. Walnough *v.* Houghton.

18. In an Action of Covenant the Breach aſſigned was the not having dreſſed Corn well, and the Damages were alledged to be eleven Pounds. Upon a Motion to bring this Sum into Court upon the common Rule, the Counſel for the Plaintiff conſented thereto; and admitted, that the Demand was in this Caſe as certain, as if the Action had been for the Non-payment of Rent.

MS. Rep. Hallet *v.* The Eaſt India Co. Hil. 1 G. 3. in K. B. 2 Bur. 1120. S. C.

19. In an Action of Covenant upon a Charter-party one Breach aſſigned was, the Non-payment of Money due for Freight; another was, the Non-payment of Money due for Demorage. A Rule was made for bringing Money into Court upon the common Rule, as to theſe two Breaches. And by Lord *Mansfield* Chief Juſtice—The ſenſible Diſtinction in ſuch Caſe is, that, if the Sum of Money, which ought to be recovered, may be aſcertained by Computation, Leave ought to be given to bring Money into Court: But where the Sum of Money cannot be aſcertained by Computation, but does in ſome Meaſure depend upon the Judgment of a Jury, it is reaſonable that the Plaintiff ſhould be at Liberty to have ſuch Judgment, without being liable to Coſts, in Caſe it ſhould be againſt him.

4. In an Action of Debt.

20. It is in the general true, that Money cannot be brought into Court upon the common Rule in an Action of Debt.

21. If an Action of Debt be brought upon a Judgment, the Court will not permit Money to be brought into Court upon the common Rule. 6 Mod. 60. Burridge *v.* Forteſcue. 7 Mod. 114.

22. A Motion being made, for Leave to bring Money into Court upon the common Rule in an Action of Debt upon Articles, it was refuſed. And by *Holt* Chief Juſtice—I never knew this allowed to be done in ſuch Caſe. 7 Mod. 141. Anon.

23. A Defendant had obtained the common Rule for bringing Money into Court, in an Action of Debt for the Penalty of a Charter-party: But it was afterwards diſcharged, as being contrary to the Courſe of the Court. 2 Barn. 231. Yeoman *v.* Roſs.

24. In an Action of Debt for Goods ſold, the Court refuſed to let Money be brought into Court upon the common Rule. Str. 890. Leapridge *v.* Pongillione.

25. But in ſome Actions of Debt, Money may be brought into Court upon the common Rule.

26. It is uſual to allow Money to be brought into Court upon the common Rule, in an Action of Debt for Rent. 1 Barn. 198. Dixon *v.* Allen. Salk. 596.

27. In an Action of Debt, wherein there was only one Count, for a Penalty of five Pounds given by a Statute, the Court gave Leave to bring the five Pounds into Court upon the common Rule. Str. 1271. Webb qui tam *v.* Punter.

28. In a very late Caſe, there was in an Action of Debt one Count for twenty Pounds, on Account of the Defendant's having had four Partridges in his Cuſtody; and another Count for other twenty Pounds, on Account of his having expoſed four Partridges to Sale. A Motion being made to pay twenty Pounds into Court upon the common Rule, Leave was given ſo to do. MS. Rep. Eaſt. 31 G. 2. Walker qui tam *v.* Keene.

29. Money could, even before the Statute, have been brought into Court upon the common Rule, in an Action of Debt upon a Bond for the Payment of a leſſer Sum; nay, it is ſaid by *Holt* Chief Juſtice, that the firſt Inſtance of giving Leave to bring Money into Court, was in an Action of Debt upon a Bond for the Payment of a leſſer Sum. 7 Mod. 141. Anon. Salk. 596. 6 Mod. 60.

30. But the Court never gives Leave to bring Money into Court upon the common Rule, in an Action of Debt upon a Bond of Indemnity, or a Bond for the Performance of a collateral Agreement. 12 Mod 598. Coke *v.* Heathcot.

31. Heretofore the Defendant, in an Action of Debt upon a Bond for the Payment of a leſſer Sum, who had obtained the common Rule for bringing Money into Court, muſt have brought in the whole Penalty of the Bond. Salk. 597. Anon.

32. This Hardſhip is remedied by the 4 *Anne*, *c.* 16. *par.* 13. it being thereby enacted, "That if pending an Action upon a Bond, with Condi-
" tion to be void upon the Payment of a leſſer Sum, the Defendant ſhall
" bring into Court all the principal Money and Intereſt due and Coſts, the
" ſaid Money ſhall be taken to be a full Satisfaction of the ſaid Bond,
" and the Court ſhall give Judgment to diſcharge every ſuch Defendant of
" the ſame."

33. It

2 Barn Suppl. 42. Wright, Executor, *v.* Swayne.

33. It has been holden, that if an Action of Debt upon a Bond for the Payment of a leſſer Sum be brought by an Executor or Adminiſtrator, the Caſe is within this Statute; the Words thereof being general.

2 Barn. 231. Atkins *v.* Taylor.

34. An Action of Debt upon a Bond to a Sheriff, conditioned for the good Behaviour of his Bailiff, and *inter alia* for paying Money collected for the Sheriff's Uſe, is not within the Statute: Becauſe the Bond is not for the Payment of a leſſer Sum.

12 Mod. 598. Coke *v.* Heathcot.

35. For the ſame Reaſon, if an Action of Debt be brought upon a Bond of Indemnity, or upon a Bond for the Performance of a collateral Agreement, Money cannot under the Statute be brought into Court.

Str. 515. Land *v.* Harris, Eaſt. 8 G. 1.

36. A Bond having been given to pay a Sum of Money by Inſtalments, at the Rate of five Pounds *per Annum*, the Obligee after the Obligor had failed in making one Payment brought an Action upon the Bond. Hereupon a Motion was made in the Court of King's Bench, that, upon bringing into Court the five Pounds with Coſts, the Proceedings in the Actions might be ſaved. No Rule was made. And by the Court—The Defendant is not intitled, under the Act of the fourth of *Anne*, to have the Proceedings ſtayed, unleſs the whole Money be brought into Court; for it never could be intended, that the Obligee ſhould be put to the Trouble of bringing an Action every Year.

Str. 814. Bridges *v.* Williamſon, Mich. 2 G. 2. Mayne *v.* Somner, Hil. 4 G. 2.

37. Since this Caſe, the Court of King's Bench has in two Caſe given Leave to bring the Arrear of Money due on a Bond to pay by Inſtalments into Court, as being a Caſe within the Statute.

Str. 597. Darby *v.* Wilkins. Mich. 7 G. 2. Lucas *v.* London, Mich. 11 G. 2.

38. But it has in two ſubſequent Caſes been holden by the ſame Court, that, as the allowing of the Arrear of Money due upon a Bond to pay by Inſtalments to be brought into Court can only be done by an equitable Conſtruction of the Statute, the Plaintiff, who ought not to be thereby deprived of any legal Advantage, may ſign Judgment in the Action upon the Bond, with a Stay of Execution until there is a Failure in ſome future Payment.

2 Barn. Suppl. 41. Moſs *v.* Hardy, Trin. 27 G. 2.

39. The Court of Common Pleas did in a ſtill later Caſe give Leave, to bring the Arrear of the Money due upon a Bond to pay by Inſtalments into Court, and it does not appear, from the Report of the Caſe, that Leave was given for the Plaintiff to ſign Judgment in the Action upon the Bond, as a Security for any future Payment.

5. In an Action of Ejectment.

40. As the only Queſtion which can ariſe in an Action of Ejectment is, Whether the Plaintiff has a Right to the Poſſeſſion of the Premiſſes thereby demanded? Money cannot be brought into Court upon the common Rule in this Action.

41. But a Rule may in ſome Caſes be had, that, upon bringing a Sum of Money into Court, the Proceedings in an Action of Ejectment ſhall be ſtayed.

Comb. 299. Salk. 597.

42. If an Action of Ejectment be brought, upon the Forfeiture of a Leaſe for Non-payment of Rent, the Leſſee, if he will make Oath that his Leaſe is not expired, may have a Rule that, upon bringing into Court the Rent which is in Arrear, the Proceedings ſhall be ſtayed.

43. By the 7 *Geo.* 2. *c.* 20. *par.* 1. it is enacted, "That where any "Action of Ejectment ſhall be brought, by any Mortgagee or Mortgagees, "his, her or their Heirs, Executors, Adminiſtrators or Aſſigns, for the Re- "covery of the Poſſeſſion of any Mortgaged Lands, Tenements or Here- "ditaments, and no Suit ſhall be then depending in any Court of Equity "in that Part of *Great Britain* called *England*, for the foreclоſing or re- "deeming of ſuch mortgaged Lands, Tenements or Hereditaments; if "the Perſon or Perſons, having Right to redeem ſuch mortgaged Lands, "Tenements or Hereditaments, and who ſhall become Defendant or De- "fendants in ſuch Action, ſhall bring into Court all the principal Monies, "and Intereſt and Coſts, ſuch Money for Principal, Intereſt and Coſts, to "be aſcertained by the Court where ſuch Action ſhall be depending, or "by the proper Officer to be by ſuch Court appointed for that Purpoſe, "the Monies ſo brought into Court ſhall be taken to be a full Satisfaction "of ſuch Mortgage, and the Court ſhall diſcharge every ſuch Mortgagor "or Defendant of the ſame."

44. But by *par.* 3. it is provided, "That this Act ſhall not extend to any "Caſe, where the Perſon or Perſons, againſt whom the Redemption ſhall "be prayed, ſhall by Writing under his, her or their Hands, or the Hands "of his, her or their Attorney, Agent or Solicitor, to be delivered before "the Money ſhall be brought into ſuch Court of Law, to the Attorney "or Solicitor for the other Side, inſiſt that the Party praying a Redemp- "tion has not a Right to redeem, or that the Premiſſes are chargeable "with other principal Sums, than what appear on the Face of the Mort- "gage, or ſhall be admitted on the other Side; nor to any Caſe, where "the Right of Redemption to the Mortgaged Lands and Premiſſes in "Queſtion ſhall be controverted by different Defendants."

6. In an Action againſt a Juſtice of the Peace on the Account of ſomething done in the Execution of his Office.

45. By the 24 *Geo.* 2. *c.* 44. *par.* 2. it is enacted, "That it ſhall be law- "ful for any Juſtice of the Peace, within one Calendar Month after being "ſerved with a Notice, that ſome Writ is intended to be ſued out againſt "him, or that a Copy of ſome Proceſs is intended to be ſerved upon him, "for ſomething done in the Execution of his Office, to tender Amends "to the Party complaining, or to his or her Attorney; and in Caſe the "ſame be not accepted, to plead ſuch Teuder in Bar to any Action to be "brought on ſuch Writ or Proceſs, together with the Plea of not guilty, "and any other Plea with the Leave of the Court; and if upon Iſſue "joined the Jury ſhall find the Amends ſo tendered ſufficient, then they "ſhall give a Verdict for the Defendant; and in ſuch Caſe, or in Caſe the "Plaintiff ſhall become nonſuit or diſcontinue his Action, or in Caſe Judg- "ment ſhall be given for ſuch Defendant upon a Demurrer, ſuch Juſtice "ſhall be intitled to the like Coſts, as he would have been intitled unto, "in Caſe he had pleaded the General Iſſue only."

46. By the ſame Statute, *par.* 4. it is enacted, "That if the Juſtice "ſhall neglect to tender any Amends, or ſhall have tendered inſufficient "Amends, before the Action is brought, it ſhall be lawful for him, with "Leave of the Court, at any Time before Iſſue joined, to pay into Court "ſuch Money as he ſhall ſee fit; whereupon ſuch Proceedings, Orders "and Judgments ſhall be had, made and given, as in other Actions where- "in the Defendant is allowed to pay Money into Court."

47. It is not neceſſary, that the Party, who pleads a Tender upon this Statute, ſhall bring the Money into Court: But as the other Party, who has

has once refuſed to accept the Amends which has been tendered, would for Want of this have no Satisfaction for the Injury received, the Court of King's Bench have taken the following Method of preventing this Hardſhip.

MS. Rep. Lawrence v. Cox, Hil. 33 G. 2. in K. B.

48. A Juſtice of the Peace, upon receiving Notice that an Action would be commenced againſt him, had tendered ten Guineas. This was not accepted; and the injured Party, without having made any Demand of the Money after the Refuſal to accept thereof, brought an Action. The Plaintiff being afterwards deſirous of accepting the Money which had been tendered, the Court of King's Bench made a Rule, for the Defendant to ſhew Cauſe, why upon the Plaintiff's diſcontinuing the Action, and paying the Defendant his Coſts ſubſequent to the Tender, the Defendant ſhould not pay the ten Guineas to the Plaintiff. And by Lord *Mansfield* Chief Juſtice —It muſt have been the Intention of the Legiſlature, that Amends to the Party injured ſhould be made as well as tendered. Cauſe was afterwards ſhewn againſt the Rule: But it was made abſolute.

7. In an Action of Replevin.

49. It is in the general true, that Money cannot be brought into Court upon the common Rule in an Action of Replevin.

Salk. 597. 7 Mod. 141.

50. But if the Defendant in an Action of Replevin avow for Rent in Arrear, the Plaintiff may bring Money into Court upon the common Rule.

Lutw. 1594. Allen v. Bayley. Freem. 339, 527. 5 Rep. 76.

51. In an Action of Replevin, the Defendant avowed the taking of the Cattle Damage-feaſant. The Plaintiff in his Replication diſclaimed Title, and pleaded; that his Cattle entered into the Defendant's Ground againſt his Will and did Damage; and that after impounding them, but before the Action was brought, he tendered ſufficient Amends. Upon a Demurrer Judgment was given for the Defendant. And by the Court—The Statute of the 21 *Ja.* 1. extends only to Actions of Treſpaſs *Quare clauſum fregit*, and not to Actions of Replevin, which remain as they were at the Common Law. Conſequently the Tender in this Caſe was not good, becauſe it was not made before the Cattle were impounded.

MS. Rep. Newſom v. Waters, Hil. 14 G. 3. in C. B.

52. Upon a Motion, for Leave to bring Money into Court upon the common Rule in an Action of Replevin, it appeared, that after the impounding of the Cattle, which had been diſtrained Damage-feaſant, but before the Action was brought, more Money had been tendered by the Plaintiff, than the Damage by the Admiſſion of the Defendant did amount to; and the Queſtion was, whether this Caſe be within the 21 *Ja.* 1. *c.* 16. It was holden that it is not. And by the Court—As the Leave to bring Money into Court, is by that Statute only given in an Action of Treſpaſs *Quare Clauſum fregit*, it cannot be extended to any other Action.

8 Rep. 147.

53. After the Right of diſtraining Cattle, as Damage feaſant, has been tried in an Action of Replevin, the Plaintiff, notwithſtanding there be Judgment for the Defendant, may tender the Damages; and if the Cattle are not thereupon delivered, he may maintain an Action of Detinue for them.

8. In an Action of Treſpaſs.

54. A Tender cannot be made, at the common Law, in Satisfaction of a Treſpaſs. Bro. Teſp. pl. 214.

55. By the 21 *Ja.* 1. *c.* 16. *par.* 5. it is enacted, "That in all Actions of "Treſpaſs *Quare clauſum fregit*, wherein the Defendant or Defendants "ſhall diſclaim Title to the Land, in which the Treſpaſs is ſuppoſed to be "done, and the Treſpaſs be by Negligence or involuntary, the Defend- "ant or Defendants ſhall be admitted to plead a Diſclaimer, and that the "Treſpaſs was by Negligence or involuntary, and a Tender of ſufficient "Amends before the Action brought, whereupon or upon ſome of them "the Plaintiff or Plaintiffs ſhall be enforced to join Iſſue."

56. In an Action of Treſpaſs for breaking the Plaintiff's Cloſe, and mowing his Baulk, the Defendant after diſclaiming Title pleaded, that he had a Baulk adjoining to the Plaintiff's; and that in mowing his own Baulk he had involuntarily, and by Miſtake, mowed ſome of the Graſs growing upon the Plaintiff's Baulk, intending only to mow the Graſs growing upon his own Baulk; and that before the Iſſuing of the Writ he had tendered to the Plaintiff two Shillings in Satisfaction; and that this was a ſufficient Amends. Upon a Demurrer to this Plea Judgment was for the Plaintiff. And by the Court—The Act in this Caſe appears to have been voluntary, and the Intention of the Defendant, which could not be known, was not traverſable. 3 Lev. 37. Baſely *v.* Clarkſon.

57. In an Action of Treſpaſs for taking Goods, the Defendant pleaded a Tender. Upon a Demurrer it was holden, that this Caſe is not within the Statute of the 21 *Ja.* 1. *c.* 16. Str. 549. Bailee *v.* Vivaſh.

58. By the 11 *G.* 2. *c.* 19. *par.* 20. a Tender may be made, before an Action of Treſpaſs is brought, for any unlawful Act done by a Perſon who has diſtrained for Rent juſty due.

59. By the 17 *G.* 2. *c.* 38. *par.* 10. a Tender may be made, before an Action of Treſpaſs is brought, for any Irregularity in diſtraining for Money juſtly due for the Relief of the Poor.

9. In an Action of Trover.

60. In an Action of Trover for Money, the Money may be brought into Court upon the common Rule. Str. 142. Anon.

61. But if an Action of Trover be brought for Goods, the Court will not allow the Value of the Goods in Money to be brought into Court upon the common Rule: For if this were ſuffered to be done, it would be in the Power of the Defendant, to ſet a Value upon the Goods of the Plaintiff. 12 Mod. 397.

62. Nor can the Goods themſelves, for which an Action of Trover has been commenced, be brought into Court upon the common Rule. Str. 142. Anon.

63. The Court would not give Leave to bring a Laced Head, for which an Action of Trover had been commenced, into Court upon the common Rule. Str. 822. Bowington *v.* Parry.

64. In an Action of Trover for Pictures, the Court refuſed to let them be brought into Court upon the common Rule. And by the Court—This Action is not to recover the Pictures, but to recover Damages to the Value thereof; and the Pictures may not now be in ſo good a Condition, as they were at the Time of the Converſion. Str. 1191. Olivant *v.* Perineau.

65. Although the Goods, for the Converſion of which an Action of Trover is brought, cannot be brought into Court upon the common Rule, the

the Defendant, if the Action be in the Court of Common Pleas, may in ſome Caſes have a Rule, that upon bringing the Goods into Court the Proceedings ſhall be ſtayed.

2 Barn. 229. Royden v. Batty.

66. A Rule was granted by the Court of Common Pleas for the Plaintiff to ſhew Cauſe, why upon bringing into Court four new-wrought Dimothy Bed-Curtains, and other Goods ſpecified in the Declaration, the Proceedings ſhould not be ſtayed: But it appearing upon ſhewing Cauſe, that the Curtains had been cut, altered and ſcoured, and thereby leſſened in their Value, the Rule was diſcharged. And by the Court—The making of a Rule of this Sort abſolute is diſcretionary; and in this Caſe it is not reaſonable, to oblige the Plaintiff to take his Goods again.

1 Barn. 220. Cooke v. Holgate.

67. If the Goods for the Converſion of which an Action of Trover is brought are heavy or bulky, the Court of Common Pleas will not make a Rule for bringing them into Court: But will make a Rule upon the Plaintiff, to ſhew Cauſe why he ſhould not conſent to accept the Goods.

68. It is not the Practice of the Court of King's Bench to make a Rule, that upon bringing into Court the Goods, for the Converſion of which an Action of Trover is brought, the Proceedings ſhall be ſtayed.

69. This Court did indeed, in one Caſe a few Years ago, make a Rule for the Plaintiff to ſhew Cauſe, why the Proceedings ſhould not, upon bringing the Thing charged to have been converted into Court, be ſtayed.

Sayer 80. Catling v. Bowling.

70. The Book called *Memoirs of a Woman of Pleaſure* having been lent by a Bookſeller for the Peruſal of ſome young Ladies at a Boarding School, the Miſtreſs of the School took it from them, and ſent it to the Bookſeller, with a Requeſt that it might not be lent to her Scholars again. The Book being afterwards found in the Poſſeſſion of one of the young Ladies, the Miſtreſs took it from her and kept it. An Action of Trover being thereupon brought, the Court of King's Bench made a Rule for the Plaintiff, to ſhew Cauſe why, upon bringing the Book into Court, the Proceedings ſhould not be ſtayed.

Sayer 120. Harding v. Wilkin.

71. But in another Caſe in the ſame Court, wherein a Motion was made upon the Authority of the laſt Caſe, that the Proceedings in an Action of Trover might be ſtayed, upon bringing into Court a Gold Watch and a Diamond Ring, for the Converſion of which it had been commenced, no Rule was made. And by *Wright* Juſtice, (*Lee* Chief Juſtice being abſent) —It has been ſaid, that in the Caſe of *Catling* v. *Bowling*, in this Court, a Rule was made to ſhew Cauſe why, upon bringing a Book into Court, the Proceeding in an Action of Trover ſhould not be ſtayed: But the Rule to ſhew Cauſe in that Caſe, which was made upon the particular Circumſtances of the Caſe, was contrary to the Courſe of the Court, and we never heard any more of that Rule.

TENURE.

UNDER the Word *Tenure* is included every Holding of an Eſtate.

But the Signification of this Word, which is very extenſive, is frequently reſtrained by coupling another Word with it.

This is ſometimes done by a Word which denotes the Duration of the Eſtate holden: As if a Man hold to himſelf and his Heirs, it is called Tenure in Fee-ſimple.

At other Times the Word *Tenure* is coupled with a Word pointing out the Inſtrument by which the Eſtate is holden: As if the holding be by Copy of Court-Roll, it is called Tenure by Copy of Court-Roll.

At other Times the Word *Tenure* is coupled with a Word which ſhews the Service by which the Eſtate is holden: As if a Man hold by Knight's Service, it is called Tenure by Knight's Service.

That Kind of Tenure, which takes its Denomination from the Duration of the Eſtate holden, has been treated of under the Title *Eſtate in Fee-ſimple* and under other proper Titles.

Tenure by Copy of Court-Roll has been treated of under the Title *Copyhold*.

At preſent the Deſign is to treat of Tenure by Service.

This ſhall be done under the following Heads:

(A) Of Tenure by Service, in the general.
(B) By what Service an Eſtate may be holden.
(C) How a Service, by which an Eſtate is holden, may be extinguiſhed.
(D) Of whom an Eſtate may be holden, and in what Caſes an Alteration may be made in the Service, by which it is holden.
(E) Of Tenure in Capite.
(F) Of Tenure in Frank-Almoign.
(G) Of Tenure by Divine Service.
(H) Of Tenure by Knights Service.
(I) Of Tenure by Eſcuage.
(K) Of Tenure by Grand Serjeanty.
(L) Of Tenure by Petit Serjeanty.
(M) Of Tenure by Caſtle Guard.
(N) Of Tenure by Coynage.
(O) Of Tenure in Burgage.
(P) Of Tenure in Villainage.
(Q) Of Tenure in Socage.

(A) Of Tenure by Service in the general.

1 Inſt. 1, 9, 23, 47, 93, 98, 144. 2 Inſt. 501.

EVERY corporeal Eſtates lies in Tenure by Service; nay every ſuch Eſtate, which is in the Poſſeſſion of a Subject, muſt Actually be in Tenure by Service: For by the Law of *England* no Eſtate can be allodial in the proper Senſe of this Word; but muſt be holden of ſome Perſon.

1 Inſt. 1.

2. Tenants in Fee-ſimple are indeed frequently called, in *Domeſday Book*, *Allodarii*: But this, which is an inaccurate Expreſſion, does only mean, that ſuch Tenants have as large an Eſtate as Subjects can have.

1 Inſt. 47, 98, 142, 144. Bro. Tend. pl. 34. pl. 75.

3. It is in the general true, that an incorporeal Eſtate holden of a Subject, does not lie in Tenure; for Tenure cannot be without ſome Service; and to every Service, except that which is due by Tenure in Frank-Almoign, Diſtreſs is incident: But as there is not in an incorporeal Eſtate any Thing, upon which the Lord to whom the Service is due can enter and diſtrain, in Caſe it be not performed, it follows, that an incorporeal Eſtate does lie in Tenure.

5 Rep. 3. Jewil's Caſe.

4. A Fair does not lie in Tenure; becauſe the Grantor has no Remedy by Diſtreſs, for a Service reſerved in the Grant of the Fair.

Bro. Tend. pl. 34. 1 Inſt. 142, 144.

5. An Advowſon appendant to a Manor does not lie in Tenure: For as ſuch Advowſon is appendant to the whole Manor, the Grantor cannot enter, and make Diſtreſs, upon any one Part of the Manor for the Service reſerved.

Bro. Tend. pl. 18. pl. 34. 1 Inſt. 47.

6. But an incorporeal Eſtate holden immediately of the Crown does lie in Tenure; for the King has by his Prerogative a Power of diſtraining, in any Part of his Tenant's Land, for the Services reſerved in the Grant of the incorporeal Eſtate.

7. And in ſome Caſes an incorporeal Eſtate does, although it be holden of a Subject, lie in Tenure.

1 Inſt. 47.

8. The Veſture or Herbage of Land lies in Tenure; for a Diſtreſs may be upon the Land, for the Service reſerved in the Grant of the Veſture or Herbage.

Bro. Tend. pl. 4. 1 Inſt. 144.

9. It ſeems to be the better Opinion, that an Advowſon in Groſs lies in Tenure; becauſe the Grantor may diſtrain upon the Glebe, if any Beaſt of the Patron be there, for the Service reſerved in the Grant of the Advowſon.

1 Rep. 62, Capel's Caſe. 1 Inſt. 47, 144. Bro. Diſtr. pl. 47. Perk. ſ. 627.

10. A Reverſion and a Remainder are both incorporeal Eſtates; yet both lie in Tenure: For although the Grantor has no Remedy for the Service reſerved, during the Continuance of the particular Eſtate, he may, as ſoon as this is determined, diſtrain for the Service, and, if it be a pecuniary one, for the Arrear thereof.

(B) By what Service an Eſtate may be holden.

1 Inſt. 142. Bro. Tend. pl. 109.

1. IF a Thing which lay in Render, and which would have been profitable to the Feoffor, had at the Common Law been reſerved in a Feoffment, it would have been a good Service.

Bro. Tend. pl. 50. pl. 109.

2. And although no Profit, from the Thing reſerved, would have accrued directly to the Feoffor; yet if from the Reſervation, Benefit would have ariſen to the Publick, the Thing reſerved would have been a good Service;

Service; for whatever is beneficial to the Publick, is in ſome Degree profitable to every Perſon.

3. But if the Reſervation in a Feoffment had been of a Thing beneficial only to a Stranger, this would not have been a good Service: Becauſe no Profit would have accrued therefrom to the Feoffor. Bro. Ten. pl. 109.

4. The Reſervation of a Thing, which lay in Prender, would not at the common Law have been a good Service.

5. If one Man had infeoffed another of Land, reſerving to himſelf Common for four Beaſts in the Land, this would not have been a good Service: Becauſe the Feoffor could not have had the Thing reſerved but by his own Act; and that which a Man does for himſelf cannot with Propriety be called a Service. 1 Inſt. 142. Perk. ſ. 702.

6. No Right to a Service could, even at the common Law, have been acquired after an Eſtate had been granted: For nothing could be due as a Service but by Reſervation; and the Perſon who had once parted with the whole of an Eſtate could not afterwards reſerve to himſelf any Thing out of it.

7. If a Man had holden an Acre of Land of *J. S.* by Suit of Court at his Manor of *A.* and *J. S.* who was alſo ſeiſed of the Manor of *B.* had agreed with a Tenant, that inſtead of doing Suit of Court at his Manor of *A.* he ſhould do it at his Manor of *B. J. S.* would not have thereby acquired a Right to Suit of Court at his Manor of *B.* for this would have been an indirect Way of reſerving a new Service as to his Manor of *B.* which ſo long as the Eſtate formerly granted continued, the Lord had no Power to do. Fitz. N. B. 211. Bro. Ten. pl. 65. 2 Inſt. 501.

8. If Land had been holden by a Rent of twenty Shillings, and the Lord had agreed with the Tenant to accept a Hawk inſtead of the Rent, the Lord could never have demanded the Hawk as a Service: Becauſe it was not reſerved in the Grant of the Land. Bro. Ten. pl. 49. 1 Inſt. 305, 306.

9. Since the Statute of *Quia emptores terrarum* the ancient Services muſt be reſerved, in every Conveyance by which a Fee paſſes, and only theſe can be reſerved: For by this Statute, after reciting, that the Purchaſers of Lands and Tenements, of the Fees of great Men and other Lords, have heretofore entered into their Fees to the Prejudice of the Lords, to whom the Freehold Tenants of ſuch great Men and other great Lords have ſold their Lands and Tenements, to be holden in Fee of their Feoffors and not of the Chief Lords of the Fees, whereby the ſame Chief Lords have many Times loſt their Eſcheats, Marriages and Wardſhips, of Lands belonging to their Fees; it is enacted, "That from henceforth it ſhall be lawful to "every Freeman, to ſell at his own Pleaſure his Lands or Tenements, or "Part of them, ſo that the Feoffee ſhall hold the ſame Lands or Tene-"ments, or Part of them, of the Chief Lord of the Fee, by ſuch Services "and Cuſtoms as his Feoffor held them before." 18 E. 1. ſt. 1. c. 1.

10. But by the 1 & 2 *Ph. & M. c.* 8. *par.* 54. This Statute, ſo far as it prevented the reſerving ſuch new Services, as could be reſerved in the Creation of Tenure in Frank-Almoign or Tenure by Divine Service, is repealed.

11. As the Statute of *Quia emptores terrarum* was made for the Advantage of Chief Lords, the King may diſpenſe with it, and licence his Tenant to reſerve any new Service. No other Lord can do this, by Reaſon of the King's Intereſt as Lord Paramount: But the King and the Meſne Lord or Lords may together diſpenſe with this Statute, and grant ſuch a Licence to the Tenant paravail. Fitz. N. B. 211. Bro. Ten. pl. 65. 2 Inſt. 501.

(C) How a Service, by which an Eſtate is holden, may be extinguiſhed.

1 Inſt. 305, 306. Bro. Ten. pl. 71. Perk. ſ. 71.

1. EVERY Lord may extinguiſh Part or the Whole of a Service by which Land is holden, either by a Releaſe in Fact or a Releaſe in Law.

2. There is a Material Difference as to the Releaſing of a Service, betwixt a Releaſe in Fact, and a Releaſe in Law.

Perk. ſ. 71.

3. If two Acres of Land are holden by one Service, and the Lord by Deed releaſe all his Right to the Service as to one Acre, this is an Extinguiſhment of the Service as to both Acres.

Perk. ſ. 71.

4. But if two Acres of Land are holden by one Service, and one of them be purchaſed by the Lord, this, although it be a Releaſe in Law of the Service as to that Acre, does not extinguiſh the whole Service; but the Service, in Caſe it be Rent or any Thing which is ſeverable, ſhall be apportioned.

Bro. Suit pl. 1. Bro. Ten. pl. 104. Perk. ſ. 71.

5. If however the Service, by which two Acres of Land are holden, be not ſeverable, as if it be a Horſe or Suit of Court, the whole is as completely extinguiſhed, where one Acre is purchaſed by the Lord, as if the Lord had, by a Releaſe in Fact, diſcharged both Acres of the Service.

Bro. Ten. pl. 104. Perk. ſ. 71.

6. If one of two Acres, which are holden by a Service that is not ſeverable, come to the Lord by Deſcent, no Part of the Service, becauſe this Acre does not come to him by his own Act but by Act of Law, is extinguiſhed: But the other Acre is ſtill liable to the whole Service.

Perk. ſ. 71.

7. If two Acres are holden by one Service, and the Lord diſſeiſe the Tenant of one Acre, the whole Service is ſuſpended; for although one Part of a Service, which is ſeverable, may be extinguiſhed by a Releaſe in Law, and the other Part may remain, a Service can never be ſuſpended as to Part, and remain as to other Part of the ſame Tenancy.

2 Rep. 52. Bro. Ten. pl. 9. 6 Rep. 5. 2 Roll. Abr. 514.

8. At the Common Law, if the Fee of an Eſtate came to the Crown by Gift, Purchaſe or Forfeiture, all the Services by which it was holden were extinguiſhed, and it might afterwards be granted to be holden by any Service.

9. But by the 7 *E.* 4. *c.* 5. it is enacted, that every Eſtate holden of a common Perſon, which ſhall come to the Hands of the King by Reaſon of an Attainder of High Treaſon, and be afterwards granted by the King to any Perſon, ſhall, from the Time of the Grant, be holden by the ſame Services as if no Attainder had been.

Bro. Avowr. pl. 46. Perk ſ. 89.

10. It is in the general true, that if a Lord become ſeiſed in Fee of an Eſtate holden of himſelf, the Service by which it was holden is extinguiſhed by the Unity of Poſſeſſion.

Perk. ſ. 89.

11. But if a Tenant infeoff his Lord of the Tenancy upon Condition, the Service is only ſuſpended; for, if the Condition be broken and the Tenant enter, it ſhall be revived: But, if before the Entry of the Tenant the Lord infeoff a Stranger, the Service is extinguiſhed; and, although the firſt Feoffor afterwards enter for Breach of the Condition, it ſhall never be revived; becauſe the Tenancy was, by the Infeoffment of the Stranger, diſcharged of the Service.

(D) Of whom an Eſtate may be holden, and in what Caſe an Alteration may be made, in the Service by which it is holden.

1. EVERY Eſtate which lies in Tenure, is by the Law of *England* holden immediately or mediately of the King who is Lord Paramount to all other Lords. 1 Inſt. 1, 9, 23, 47, 93. 2 Inſt. 501.

2. Every other Lord, of whom an Eſtate is holden, is from his Situation between the King and the Tenant paravail called Meſne Lord; yet, as one Manor may be holden of another Manor, one Meſne Lord may be Lord Paramount to another Meſne Lord. Fitz. N. B. 135.

3. If Lord, Meſne and Tenant are, and the Meſne releaſe to the Tenant, the Tenant ſhall hold of the Lord by the ſame Service as the Meſne held; for, although the Service due from the Tenant to the Meſne be extinguiſhed by the Releaſe, the Tenant has by his own Act put himſelf into the Place of the Meſne. 2 Inſt. 502. Bro. Ten. pl. 97. 2 Roll. Abr. 512.

4. But where Lord, Meſne and Tenant are, and the Meſnalty is determined by the Act of God, as by Eſcheat upon the Death of the Meſne without Heir, the Tenant ſhall hold of the Lord by the ſame Service as he before held of the Meſne: For, although the Seigniory does in this Caſe merge into the Meſnalty, which is more advantageous for the Lord, becauſe it brings him nearer to the Tenancy, the Tenant ſhall not be thereby prejudiced. Bro. Ten. pl. 37. pl. 97. 2 Roll. Abr. 512.

5. So if there be Lord, Meſne and Tenant, and the Meſnalty be determined by Act of Law, as by Eſcheat for Felony, the Tenant ſhall hold of the Lord by the ſame Service as he before held of the Meſne. Bro. Ten. pl. 91. 2 Roll. Abr. 513.

6. If Lord, two Meſnes and Tenants are, and the ſecond Meſnalty come by Act of God or of Law to the firſt Meſne, the firſt Meſnalty, it being more advantageous for the firſt Meſne, merges into the ſecond; yet the ſecond Meſne ſhall hold of the Lord by the ſame Service as the firſt did. 2 Inſt. 502. 2 Roll. Abr. 513.

7. At the common Law a Man might have aliened his whole Tenancy in Fee, to be holden of the Lord; but he could not have aliened a Part thereof in Fee, to be holden of the Lord; for, as by this Means there would have been a Diviſion of the Service, the Lord could not have diſtrained in the Part ſo aliened, or the whole thereof, as he might have done before the Alienation. 2 Inſt. 65.

8. But a Man might at the Common Law have aliened a Part of his Tenancy in Fee, to be holden of himſelf: For, as the Service would ſtill have remained intire, the Lord could have diſtrained in the remaining Part for the Whole thereof. 2 Inſt. 65.

9. In Conſequence of this Liberty, many Tenants did alien ſo much of their Tenancies, that there was not enough left, to anſwer to the reſpective Lords for the Services due to them.

10. For the Sake of putting a Stop to this Practice, which was prejudicial to the Lord of whom the Tenancy was holden, it was provided by *Magna Charta*, that no Tenant ſhould alien ſo much of his Tenancy in Fee, as not to leave ſufficient to anſwer to the Lord for the whole Service. Magn. Chart. c. 32.

11. As frequent Queſtions aroſe, after the making of this Statute, whether after an Alienation of Part a Sufficiency of the Tenancy was left to anſwer to the Lord for the whole Service, it was by the Statute of *Quia emptores terrarum* enacted, that, if any Tenant ſhall alien a Part of his Land or Tenement in Fee, the Alienee ſhall hold the Part ſo aliened immediately 18 E. ſt. 1. c. 2. 2 Inſt. 66.

immediately of the Chief Lord of the Fee, and ſhall be forthwith charged with the Service, for ſo much as pertaineth or ought to pertain to the ſaid Chief Lord for ſuch Part, in Proportion to the Quantity of the whole Land or Tenement.

Bro. Ten. pl. 21. pl. 37, 96. 1 Inſt. 505. 2 Roll. Abr. 501.

12. As this Statute, although made after the Statute *De donis*, is confined to Lands and Tenements of which the Fee is granted, if a Gift in Tail be made, the Donèe ſhall hold of the Donor and not of the Chief Lord; for, ſo long as the Reverſion continues in the Donor, the Donee muſt hold of him; and the Law will not ſuffer the Donee to hold both of the Donor and of the Chief Lord.

1 Inſt. 23, 2 Inſt. 502.

13. But if a Baron, ſeiſed in Fee of an Inheritance in the Right of his Feme, make a Gift in Tail, the Donee ſhall not hold of the Baron, but of the Lord of whom the Feme held; becauſe the Baron had nothing but in the Right of the Feme.

2 Inſt. 505.

14. Notwithſtanding the Statute of *Quia emptores terrarum* ſpeaks only of Eſtates in Fee-Simple, yet if a Gift is made to *A.* for Life or in Tail, with Remainder to *B.* in Fee, the Tenant for Life or in Tail ſhall hold of the Chief Lord; for as the whole Fee is departed with by the Donor, neither of the Donees can hold of the Donor, and conſequently both muſt hold of the Chief Lord.

2 Roll. 499.

15. As a Man ſeiſed of two Manors might, before the Statute of *Quia emptores terrarum*, by a Feoffment in Fee, ſo he may now by a Gift in Tail, convey a Parcel of one Manor and a Parcel of the other, to be holden of himſelf as one Tenancy of the ſame Service; and the Service ſhall in ſuch Caſe be regardant to both Manors.

(E) Of Tenure in Capite.

1 Inſt. 108. Bro Ten. pl. 6. pl 47.

1. EVERY Eſtate is holden of the Perſon, of him of whom the Eſtate is holden, or of ſome Honour or Manor of which that Perſon is ſeiſed.

1 Inſt. 108. Bro. Tend. pl. 47. pl. 60. pl. 65.

2. Every Holding of the Perſon is, to ſpeak with Propriety, a Tenure *in Capite:* But only Tenure of the King's Perſon has been by Way of Eminence ſo called; for wherever the Holding was of the Perſon of a Subject, it was called Tenure in Groſs, to diſtinguiſh it from Tenure of a Manor.

Mad. Hiſt. Exch. 432, 433.

3. Tenure *in Capite* ſeems not to have been well underſtood, either by Mr. *Selden* or Sir *Henry Spelman*; for both of them, as appears plainly from ſome Paſſages in their Works, were of Opinion, that every Tenure *in Capite* was a Tenure by Barony.

Mad Hiſt. Exch. 432, 433.

4. It is very true, that about the Time of *Henry* the Second moſt of the King's Tenants *in Capite* were real or reputed Barons: But this was not owing to their being Tenants *in Capite*, but to the Largeneſs of the Seigniories which they held of the King

1 Inſt 108. 2 Inſt. 7. Bro. Ten. pl. 46. pl 94. 2 Roll. Abr. 503.

5. It is alſo true, that in ancient Times every one, who held by Barony, was a Tenant *in Capite*; but the Converſe of this Propoſition, that every Tenant *in Capite* was a Tenant by Barony, is not true: And upon Examination it will be found, that by Tenure *in Capite* nothing more was meant, than a Holding of the Perſon of the King; and that, ſo far from its being confined to a Tenure by Barony, a Man might have holden of the Perſon of the King by Knight's Service, Socage or any other Tenure, as well as by Barony.

9 Rep. 123. Lowe's Caſe Bro. Ten. pl. 3.

6. At the Common Law, Tenure *in Capite* was, in the general, ſo inſeparable from a Holding of the Perſon of the King, that if Land or Tenement was granted by the King, to hold of his Perſon, the Grantee although

no

no Service was reſerved, would have been Tenant *in Capite*; becauſe this Tenure was moſt advantageous for the King.

7. If the King had purchaſed Land or Tenement of a Subject, and had afterwards granted it, to be holden of his Perſon, without reſerving any Service, this Grant would have created a Tenure *in Capite*. Bro. Ten. pl. 9. 2 Roll. Abr. 504, 505.

8. If an Honour had been forfeited to the King, and a Manor holden thereof had come thereby to him, and the King, after being ſeiſed of the Manor, had enfeoffed any Perſon of it, to be holden of his Perſon, the Feoffee would, although no Service was reſerved, have been Tenant *in Capite*. 2 Inſt. 64. Bro. Ten. pl. 9. 2 Roll. Abr. 505.

9. But in ſome Caſes a Grant, to hold of the Perſon of the King, did not, even at the Common Law, create a Tenure *in Capite*.

10. If an Honour had been ſeiſed into the King's Hands, and a Manor holden thereof had eſcheated to him, as of a common Eſcheat, and the King, after being ſeiſed of the Manor, had granted it to be holden of his Perſon, the Grantee would have held it by the ſame Service as the Manor was before holden; becauſe this was not a Forfeiture to the King as King, but an Eſcheat to him as Lord. 2 Inſt. 64. Bro. Ten. pl. 9. 2 Roll. Abr. 502.

11. So if Land or Tenement, holden of a Meſne Lord, had come to the King by Forfeiture for High Treaſon, and the King, after being ſeiſed thereof, had granted it to *J. S. Tenendum de nobis, hæredibus et ſucceſſoribus noſtris, et aliis Capitalibus Domini feodi illius, per ſervitia inde debita et de jure conſueta*, *J. S.* would not have been Tenant *in Capite*; for by this Grant the Tenure of the Meſne Lord, as well as that of the King as ſupreme Lord, would have been revived. 6 Rep. 6. Molyn's Caſe. Bro. Ten. pl. 3. 2 Roll. Abr. 502.

12. An End was put to many Diſtinctions concerning Tenure *in Capite*, which prevailed at the Common Law, by a Statute made in the firſt Year of *Edward* the Sixth, it being thereby enacted, "That ſuch Honours, "Caſtles, Manors, Lands, Tenements or other Hereditaments, which "now are or hereafter ſhall be holden of the King, his Heirs or Suc- "ceſſors, which did come to the King, or his Noble Anceſtors, or here- "after ſhall come to the King, his Heirs or Succeſſors by any Attainder, "Conviction, Outlawry or Surrender, ſhall not from henceforth be ad- "judged, deemed or conſtrued, to be holden *in Capite*; any Ambiguity, "Doubt or Queſtion, heretofore moved to the contrary notwithſtand- "ing." 1 E. 6. c. 4.

13. It is ſaid in ſome Books, that, at the Common Law, every Holding of the King, as of an Honour, was a Tenure *in Capite*. 1 Inſt. 77. Fitz. N. B. 256. Bro. Liv. pl. 58.

14. But it ſeems to be the better Opinion, that no Grant, to hold of the King as of an Honour, did, even at the Common Law, create a Tenure *in Capite*; and that *Magna Charta* is not introductive of any new Law as to this Matter, but declaratory of the Common Law. 1 Inſt. 108. 2 Inſt. 64. Bro. Ten. pl. 61. pl. 100. Magna Ch. c. 30.

15. It is indeed true in Fact, that divers Lands and Tenements were heretofore holden of the King *in Capite*, as of certain Honours, and particularly as of the Honour of *Lancaſter*: But this is eaſily to be accounted for. Bro. Ten. pl. 1.

16. As ſome Honours, and particularly that of *Lancaſter*, had heretofore *Jura regalia* annexed to them, the Perſon ſeiſed of ſuch an Honour, being a Kind of petty King, might very well have created a Tenure *in Capite*; and if Lands or Tenements were once holden of ſuch an Honour *in Capite*; they would, if the Honour came afterwards into the Hands of the King, be holden of him *in Capite*, as of that Honour. 2 Roll. Abr. 503.

17. Every

2 Inſt. 501. 2 Roll. Abr. 504. Dav. 59. 17. Every Tenant *in Capite* muſt originally have been created by a King, or by a Perſon poſſeſſed of *Jure regalia*; for no Tenure, which was originally created by a Subject, could afterwards become a Tenure *in Capite*.

2 Roll. Abr. 504. 18. If a Prince of the Blood had granted Land or Tenement to be holden of his Perſon, this, although he afterwards ſucceeded to the Crown, would not have become a Tenure *in Capite*.

1 Inſt. 108. 2 Roll. Abr. 504. Dav. 59. 19. If a Tenant had holden of the Perſon of Meſne Lord, and the Seigniory of the Meſne Lord had been forfeited to the King for High Treaſon, the Tenure, although the Holding would from thenceforth have been of the Perſon of the King, would not have become a Tenure *in Capite*.

20. A Tenant *in Capite*, beſides being liable to the Services and Fruits of the particular Tenure by which he held, was moreover liable, on the Account of his Tenure *in Capite*, to a Fine for Alienation, and to Primer Seiſin.

21. But by the 12 *Car.* 2. *c.* 24. *par.* 1. Tenure *in Capite* was changed into Tenure in Common Socage, and all Perſons, who before held *in Capite*, were diſcharged of a Fine for Alienation, and of Primer Seiſin.

(F) Of Tenure in Frank-Almoign.

1. THE Services, by which Eſtates may be holden, are ſometimes Spiritual, at other Times Temporal.

2. Tenures by Spiritual Services are two; Tenure in Frank-Almoign, and Tenure by Divine Service.

3. No Perſon, except an Eccleſiaſtick, can hold by either of theſe Tenures.

1 Inſt. 93, 94. 4. Tenure in Frank-Almoign is where an Eccleſiaſtick holdeth Lands of a Lord, without any Service being annexed to the Tenure.

1 Inſt. 96, 97. 5. As the Divine Service, which ought of Right to be performed, is never aſcertained by the Deed creating a Tenure in Frank-Almoign, no Diſtreſs can be made, although it be not performed: But if the Divine Service, which of Right ought to be performed, be not performed, the Ordinary or Viſitor may puniſh the Tenant for the Default.

1 Inſt. 93, 95. 6. An Eccleſiaſtick who holds in Frank-Almoign is bound of Right to make Oriſons, to ſay Prayers, or Maſſes, or to perform other Divine Service, for the Soul of the Grantor, and for the Souls of ſuch Heirs of the Grantor as are dead, and for the Proſperity and good Life of ſuch Heirs of the Grantor as are living.

Hawk. Abr. Co. Inſt. 146. 7. As the Manner of celebrating Divine Service has been altered by divers Statutes, it is ſufficient, if a Tenant in Frank-Almoign perform ſuch Divine Service, as he may now lawfully perform.

1 Inſt. 99. 2 Inſt. 502. 18 E. 1. ſt. 1. 8. As no Land or Tenement can be holden in Frank-Almoign, except of the original Grantor and his Heirs, a Stop was put to the Creation of this Tenure by the Statute of *Quia emptores terrarum*: It being thereby enacted, that the Grantee of an Eſtate in Fee, in any Land or Tenement, ſhall hold the ſame of the Chief Lord of the Fee, by ſuch Services as the Grantor before held.

9. But by the 1 & 2 of *Ph. & M. c.* 8. *par.* 54. A Licence was given to create a Tenure in Frank-Almoign.

10. A Grant to hold in Frank-Almoign does ſo intirely exclude all temporal Services, that Fealty, which is incident to every other Tenure, is not incident to that in Frank-Almoign. 1 Inſt. 93, 95.

11. But if a Tenant in Frank-Almoign alien his Land or Tenement in Fee, to be holden of the Lord by the ſame Services as he held, the Alienee although he be an Eccleſiaſtick ſhall hold it by Fealty: For he cannot hold in Frank-Almoign, becauſe he does not hold of the original Grantor or his Heirs; and, as every Tenant, except Tenant in Frank-Almoign, muſt hold by ſome Service, the Law creates a Tenure by Fealty; becauſe this Tenure, Fealty being the laſt Service which can be done, is neareſt to the Freedom of the former Tenure. 1 Inſt. 98, 99. 2 Inſt. 502.

12. A Tenant in Frank-Almoign is not only exempted, from all temporal Services: But the Lord, of whom he holds, is likewiſe bound to acquit him of every Service and Fruit of Tenure, which any Lord Paramount may demand from the Land or Tenement holden by this Tenure; and, if the Lord, of whom the Tenant in Frank-Almoign holds, do not acquit him of every ſuch Service and Fruit, but ſuffer a Diſtreſs to be made for the ſame, he may have a Writ of Meſne againſt the Lord, and recover Damages. 1 Inſt. 99, 100.

13. By the 12 *Car.* 2. *c.* 24. *par.* 7. it is provided, That Tenure in Frank-Almoign ſhall not be thereby taken away, nor be ſubject to any other Service, than it was before ſubject to.

(G) Of Tenure by Divine Service.

1. TENURE by Divine Service is in many Reſpects ſo ſimilar to Tenure in Frank-Almoign, that, inſtead of repeating what was ſaid under the laſt Head, it will be ſufficient to point out the Difference betwixt the two Tenures.

2. The Divine Service to be performed by a Tenant by Divine Service is always aſcertained in the Deed creating the Tenure, as that certain Prayers ſhall be ſaid upon every *Friday* in the Year; which is never done in the Deed creating a Tenure in Frank-Almoign. 1 Inſt. 96, 97.

3. The Conſequence is, that the Lord may diſtrain, if the Divine Service be not performed; for wherever a Service due by Tenure is certain, a Diſtreſs may be made if it be not performed. 1 Inſt. 96.

4. Another Difference is, that a Tenant by Divine Service is liable to Fealty, Fealty being incident to every Service, for the Neglect of which a Diſtreſs may be made. 1 Inſt. 97.

5. It is not provided by the 12 *Car.* 2. *c.* 24. as is done in the Caſe of Tenure in Frank-Almoign, that Tenure by Divine Service ſhall not be taken away; but this Tenure is not thereby expreſsly taken away.

(H) Of Tenure by Knight's Service.

1. TENURES by Temporal Services were heretofore very numerous; for, before the Statute of *Quia emptores terrarum*, a Reſervation of any Service, which was profitable to the Grantor, would have created a Tenure by that Service.

2. The

2. The Tenures by temporal Services which had acquired diſtinct Names, were Tenure by Knight's Service, Tenure by Eſcuage, Tenure by Grand Serjeanty, Tenure by Petit Serjeanty, Tenure by Caſtle Guard, Tenure by Cornage, Tenure in Burgage, Tenure in Villainage, and Tenure in Socage.

3. Some of theſe Tenures are now taken away; others of them are changed into Tenure in Socage: But as frequent Mention is made of theſe Tenures in the Books, it cannot be amiſs to give a ſhort Account of every one of them.

1 Inſt. 74. 4. Tenure by Knight's Service was the Holding of an Eſtate by ſome corporal Service, to be performed for the Defence of the Realm.

5. It will follow from this Definition, that divers Tenures, as Tenure by Eſcuage and ſome others, were in Reality, notwithſtanding they have from the Specialty of the Services to be performed acquired other Names, Tenures by Knight's Service.

6. And indeed every corporal Service, which a Tenant was bound to perform in War, was, although the Service itſelf was not of a military Kind, Knight's Service.

1 Inſt. 69. 7. Sir *Richard Rockeſley* was bound by Tenure to be *Vantarius Regis*, that is, the King's Running-Footman, when he went into *Gaſcony* to make War, until he had worn out a Pair of Shoes which coſt Four Pence. This Service, as it was to be performed when the King went into *Gaſcony* to make War, was holden to be Knight's Service.

1 Inſt. 74, 75. 8. Knight's Service was called *Chivalry*; becauſe the Service was for the moſt Part to be performed on Horſeback.

1 Inſt. 69, 74. 9. It was alſo called *Servitium forinſecum*; becauſe a Tenant was liable to this, over and above all other Services which were due to his Lord.

1 Inſt. 74, 75. 10. It has been alſo called *Servitium regale*, becauſe it was ultimately due only to the King; for no Lord, although his Tenant held of him by Knight's Service, could compel the Performance thereof, unleſs the Lord was himſelf with the King's Army in actual Service, or had compounded with the King for his own Service.

11. This Service was in many Grants expreſsly reſerved; and where this was not done, as it was inſtituted for the Defence of the Realm, every Intendment was made to increaſe it as much as poſſible.

9 Rep. 123. Bro. Ten. pl. 3. pl. 7. 1 Inſt. 85, 86. 12. Wherever Land or Tenement was granted, and there was not in the Grant ſuch a Reſervation as did create a Tenure in Socage, it was conſtantly holden, that ſuch Land or Tenement ſhould be holden by Knight's Service.

1 Inſt. 68, 69, 70, 74, 75. 2 Roll. Abr. 511. 13. Every Tenant liable to this Service, who held ſo much Land as amounted to a Knight's Fee, was upon being ſummoned bound to come on Horſeback, or to ſend a ſufficient Deputy, well arrayed to any Place within the Realm, which was appointed by the King; and every Tenant liable to this Service, who held leſs than a Knight's Fee, was bound to contribute, in Proportion to the Eſtate by him holden, to the Expence of a Horſeman.

1 Inſt. 69. 14. The Opinions are different, as to the Quantity of Land which did amount to a Knight's Fee: But the better Opinion ſeems to be, that this did not depend upon the Quantity, but upon the Value of the Land; for that any Quantity, of the Value of twenty Pounds a Year, did amount to a Knight's Fee.

1 Inſt. 75. 15. Knight's Service being inſtituted for the Defence of the Realm, an Heir was held to be incapable of performing it before he was twenty-one Years of Age; and, that he might, during his younger Years, be taught Deeds of Chivalry, and virtuous and worthy Sciences, the Lord was during his Minority to have the Cuſtody of the Heir.

1 Inſt. 75. 16. Tenants by Knight's Services were in antient Times intitled to divers Privileges and Exemptions, for the Sake of encouraging them, to be the better prepared with Horſes and Arms for the Defence of the King and Realm:

Realm: But theſe were loſt many Years before Tenure by Knight's Service was taken away.

17. Beſides the Military Service due from a Tenant by Knight's Service, he was alſo liable to the Services of Homage and Fealty.

18. The Fruits, to which this Tenure was liable, were Ward, Marriage, Aid for making the Lord's eldeſt Son a Knight, Aid for the Marriage of the Lord's eldeſt Daughter, and Relief.

19. By the 12 *Car.* 2. *c.* 24. *par.* 1. Tenure by Knight's Service is changed into Tenure in Socage.

20. By the ſame Statute, *par.* 2. the Socage Tenure, into which Tenure by Knight's Service is changed, is diſcharged of Homage, Ward, Marriage, Aid for making the Lord's eldeſt Son a Knight, and Aid for the Marriage of the Lord's eldeſt Daughter.

21. And by the ſame Statute, *par.* 5. it is enacted, That the new Tenure in Socage ſhould be only liable to ſuch Relief, as Tenure in Socage was before liable to.

(I) Of Tenure by Eſcuage.

1. IF a Man were by Tenure bound to perform Knight's Service in a Voyage Royal, this was Tenure by Eſcuage.

2. Every Tenant by Eſcuage was alſo Tenant by Knight's Service: But many Tenant's by Knight's Service were not liable to Eſcuage; for Eſcuage was never due but by ſpecial Reſervation. 1 Inſt. 69, 82, 83, 106, 108.

3. As every going of the King into *Scotland*, or into any other Place out of *England*, was called a Voyage Royal, there were of Courſe other Voyages Royal as well as for War: But Eſcuage was only due in a Voyage Royal for War. 1 Inſt. 69.

4. And this Service was only due in ſuch Voyage Royal for War, as was undertaken for the Suppreſſion of a Rebellion, or for the Defence of the Realm: for, if the Deſign of the Voyage Royal were to make a new Conqueſt, Eſcuage was not due. 1 Inſt. 68. 2 Roll. Abr. 508.

5. Whenever the King, either in Perſon or by his Lieutenant, undertook a Voyage Royal in which Eſcuage was due, every Tenant of a whole Knight's Fee, who was liable to this Service, was bound to be with the King's Army, or to ſend ſome able Man to be there in his Room, well arrayed for the Space of forty Days, or to compound with the King for ſuch Service; and if he held more or leſs than a whole Knight's Fee, he was bound to be with the King's Army, in Perſon or by Deputy, for a longer or ſhorter Space of Time than forty Days, in Proportion to what he held, or to compound for ſuch Service. 1 Inſt. 69, 72. Fitz. N. B. 83. 2 Roll. Abr. 510.

6. The Time of a Service in a Voyage Royal did not commence, until the King had entered into the foreign Nation: For it could not till then be performed. 1 Inſt. 71.

7. But every Tenant by Eſcuage was not, unleſs he held immediately of the King, obliged to ſerve in every Voyage Royal where Eſcuage was due. 1 Inſt. 69.

8. If two Meſne Lords and Tenant paravail all held by this Service, neither the ſecond Meſne, nor the Tenant paravail, was bound to perform it, unleſs the firſt Meſne did perform it to the King: But if the firſt Meſne did perform it to the King, the ſecond was bound by his Tenure of the firſt to perform it to him; and in like Manner if the ſecond did perform it to the firſt Meſne, the Tenant paravail was alſo bound to perform it to the ſecond Meſne. 1 Inſt. 69, 70. Fitz. N. B. 84. 2 Roll. Abr. 510.

9. Although

1 Inſt. 69, 70. Fitz. N. B. 84. 9. Although however neither the ſecond Meſne, nor the Tenant paravail, was bound to ſerve in a Voyage Royal, unleſs the firſt Meſne did ſerve in the Voyage; yet, if either of theſe did ſerve in the Voyage, for ſo long Time as the firſt Meſne ought to have ſerved, this would have excuſed the Default of the firſt Meſne: For only one Eſcuage was due to the King for the Tenancy.

1 Inſt. 27. Fitz. N. B. 83. 2 Roll. Abr. 508. 10. As ſoon as the King's Army was returned from a Voyage Royal, every one of his Tenants by Eſcuage, who had not performed the Service, nor compounded with the King for it, was liable to pay a Sum of Money for his Default.

1 Inſt. 72, 73. Fitz. N. B. 83. 11. And in like Manner every Meſne Lord, who held of a ſuperior Lord by Eſcuage, and every Tenant paravail who held by Eſcuage, was liable to pay a Sum of Money to the Lord of whom he held, for his Default in not performing the Service, or compounding for it: But if ſuch ſuperior Lord had himſelf made Default, he was not intitled to receive any Thing, for the Default of Meſne Lord.

1 Inſt. 72, 73. Fitz. N. B. 83. 12. The Sum to be paid by Tenants by Eſcuage, who had made Default, was always aſcertained by Parliament: For as it concerned a great Number of Perſons, the King could not aſcertain it by his own Authority.

1 Inſt. 72. Fitz. N. B. 83. 13. The Manor of aſcertaining the Sum, to be paid in ſuch Caſe, was at the Rate of a Sum certain for a Knight's Fee, and of a proportionate Sum for a greater or leſſer Quantity of Land than a Knight's Fee.

Ante 45. 14. By the 12 *Car.* 2. *c.* 24. *par.* 2. Tenure by Eſcuage underwent the ſame Changes, as Tenure by Knight's Service did.

(K) Of Tenure by Grand Serjeanty.

1 Inſt. 105, 106, 107. 1. IF a Man be by Tenure bound, to perform a Military Service to the Perſon of the King, as to carry his Banner or his Lance, this is Tenure by Grand Serjeanty.

1 Inſt. 105, 106, 107. 2. The Service due by this Tenure was called Grand Serjeanty, or the great Service; becauſe, on Account of the Excellency of the Perſon to whom it was to be performed, it was a greater and more worthy Service: For if the ſame Service were to have been performed to the Perſon of a Meſne Lord, it would have been only Knight's Service.

1 Inſt. 106. 3. Tenure by Grand Serjeanty were not however confined, to the holding by a Military Service to be performed to the Perſon of the King.

1 Inſt. 106. 4. For if a Man were by Tenure bound to execute the Office of Marſhal, High Conſtable, High Steward or Great Chamberlain of *England*, this was Tenure by Grand Serjeanty.

1 Inſt. 106. 5. It was alſo Tenure by Grand Serjeanty, if a Man were by Tenure bound, to execute an Office which concerned the Receipt of the King's Treaſure, or the Adminiſtration of Juſtice.

1 Inſt. 106. 6. It was alſo Tenure by Grand Serjeanty, if a Man were by Tenure bound, to perform any Service to the Perſon of the King at his Coronation, as to carry the Sword or Cup.

1 Inſt. 105. 7. If the Service due by this Tenure were of a military Kind, it could never be performed by Deputy.

1 Inſt. 107. 8. If the Service due by this Tenure were to be performed in Time of Peace, and the Man, who by Tenure ought to do the ſame, were not of ſufficient

ſufficient Dignity for the Performance thereof in Perſon, he was allowed to make ſome Perſon of ſufficient Dignity his Deputy.

9. But if a Woman, or an Infant, became ſeiſed of any Land or Te- 1 Inſt. 107.
nement, to which the Performance of a Service due by this Tenure in the Time of Peace was annexed, neither of theſe could make a Deputy: But a proper Perſon, both of theſe being incapable thereof, was appointed by the King to perform it.

10. Although every Tenant by Grand Serjeanty was likewiſe Tenant 1 Inſt. 105, by Knight's Service; yet every ſuch Tenant was exempted from the Aid 107. for making the Lord's eldeſt Son a Knight, and likewiſe from the Aid for the Marriage of the Lord's eldeſt Daughter, to both which other Tenants by Knight's Service were liable.

11. By the 12 *Car.* 2. *c.* 24. *par.* 1. Tenure by Grand Serjeanty is changed into Tenure in Socage.

12. But by the ſame Statute, *par.* 7. It is provided, That no honorary Service, which was before due by this Tenure, ſhould be taken away.

(L) Of Tenure by Petit Serjeanty.

1. IF a Man be by Tenure bound to pay yearly to the King, as a Bow, 1 Inſt. 108.
an Arrow, or any other Inſtrument of War, this is Tenure by Petit Serjeanty.

2. A Tenant by Petit Serjeanty was only liable to Fealty, and the Pay- 1 Inſt. 108.
ment of the Thing due.

3. This Tenure, notwithſtanding its being called by another Name, is a 1 Inſt. 108.
Species of Tenure in Socage.

(M) Of Tenure by Caſtle-Guard.

1. IF a Man were by Tenure bound, upon reaſonable Notice given 1 Inſt. 82, 83.
that an Enemy was coming, to defend a Tower, or any certain Part of a Caſtle, belonging to his Lord, or to pay a certain Rent in lieu of ſuch Service, this was Tenure by Caſtle-Guard.

2. If the Tenant had not the Alternative of paying a certain Rent in 1 Inſt. 87.
lieu of this Service; but was obliged to perform it in Perſon, or by Deputy, this Tenure was a Species of Tenure by Knight's Service.

3. And it continued to be a Species of Tenure by Knight's Service, al- 1 Inſt. 87.
though a Sum of Money in Groſs was in lieu of the Service voluntarily paid by the Tenant and received by the Lord.

4. Wherever a certain Rent was to be paid to the Lord in lieu of the 1 Inſt. 87.
Service, this Tenure was a Species of Tenure in Socage.

5. If a Tenant by Caſtle-Guard were at any Time called out to perform Magn. Chart.
Knight Service in the King's Army, he was, for ſo long Time as he ſerved c. 20.
in the King's Army, excuſed from the Service of Caſtle-Guard. 2 Inſt. 34.

6. The

1 Inſt. 83. 6. The Service due by this Tenure was not diſcharged, although the Caſtle to which it appertained was entirely demoliſhed, the Tenant being in ſuch Caſe only excuſed from the Service, until the Caſtle was rebuilt.

4 Rep. 86. Bro. Ten. pl. 11. 1 Inſt. 83. 7. But if Lord and Tenant by Caſtle-Guard were, and the Lord had granted the Seigniory whilſt the Caſtle was demoliſhed, the Service due by this Tenure would have been diſcharged; becauſe the Grantee had not the Caſtle: Nor could it have been revived, if the Grantee had built a new Caſtle.

8. Wherever this Tenure was a Species of Tenure by Knight's Service, it is by the 12 *Car.* 2. *c.* 24. *par.* 1. changed into Tenure in Socage.

Ante 45. 9. And by the ſame Statute, *par.* 2. Tenants by Caſtle-Guard, who were alſo Tenants by Knight's Service, are diſcharged of ſuch Services and Fruits of Tenure, as other Tenants by Knight's Service are diſcharged of.

(N) Of Tenure by Cornage.

1 Inſt. 106. 1. IF a Man were by Tenure bound to wind a Horn, for the Sake of alarming the Country, as often as he heard that an Enemy was come or about to come into *England*, this was Tenure by Cornage.

1 Inſt. 186. 2. This Tenure, if the Tenant held immediately of the King, was a Species of Tenure by Grand Serjeanty: But if he held of a common Perſon, it was a Species of Tenure by Knight's Service.

3. By the 12 *Car.* 2. *c.* 24. *par.* 1. this Tenure is changed into Tenure in Socage.

4. And by the ſame Statute, *par.* 2. ſuch Tenants by Cornage, as were likewiſe Tenants by Grand Serjeanty, are diſcharged of ſuch Services and Fruits of Tenure, as other Tenants by Grand Serjeanty are diſcharged of; and ſuch Tenants by Cornage, as were likewiſe Tenants by Knight's Service, are diſcharged of ſuch Services and Fruits of Tenure, as other Tenant's by Knight's Service are diſcharged of.

(O) Of Tenure in Burgage.

1 Inſt. 109. 1. IF a Man hold an Eſtate, which lies in a Borough, of the King or Lord of the Borough, by a certain yearly Rent, this is Tenure in Burgage.

1 Inſt. 109. 2. Tenure in Burgage was only liable to Fealty, and the Payment of the yearly Rent.

1 Inſt. 109. 3. This Tenure, notwithſtanding its being called by another Name, is a Species of Tenure in Socage.

(P) Of

(P) Of Tenure in Villainage.

1. IF a Man were by Tenure bound to perform a baſe Service for his Lord, this was Tenure in Villainage.

2. Tenure in Villainage was of two Kinds: Tenure in Villainage, and Tenure in pure Villainage.

3. In the former of theſe, the Service to be performed, although baſe, was certain, as to carry the Dung of the Lord, and ſpread it upon his Land. 1 Inſt. 116.

4. In the latter, the Service, which depended altogether upon the Will of the Lord, was ſo uncertain, that the Tenant could never tell at Night, what Service he was to perform the next Morning. 1 Inſt. 116

5. Only a Villain could be a Tenant in pure Villainage: But a Freeman might be a Tenant in Villainage. 1 Inſt. 116.

(Q) Of Tenure in Socage.

1. IF a Man be by Tenure bound to pay any certain Thing to the Lord, this is Tenure in Socage.

2. Tenure in Socage is ſo called from *Soca*, a Soke or Plough, becauſe the Service reſerved, at the firſt Inſtitution of this Tenure, was to be performed with a Plough. 1 Inſt. 86.

3. In antient Times every Tenant in Socage was bound, by a Reſervation in his Grant, to ſerve a certain Number of Days in every Year, in ploughing and ſowing the Demeſne Lands of his Lord. 1 Inſt. 86.

4. Afterwards the Service was by Agreement between the Lord and Tenant changed into a certain Payment: But the Name of Tenure in Socage was ſtill retained. 1 Inſt. 86.

5. In ſtill later Times every Tenure, by which a certain Thing was to be paid to the Lord, was, for the Sake of diſtinguiſhing it from Tenure by Knight's Service, called Tenure in Socage, notwithſtanding there was no Reſervation in the Grant of the Service of the Plough. 1 Inſt. 86,87. 2 Roll. Abr. 502.

6. If the Reſervation in the Grant were of a Roſe, a Pair of Spurs, or a Rent, every ſuch Reſervation made a Tenure in Socage. 1 Inſt. 86.

7. If a Man were by Tenure bound to pay annually to the King a Bow, an Arrow, or any other Inſtrument of War, this, notwithſtanding its being Tenure by Petit Serjeanty, as the Payment was to be of a Thing certain, was a Species of Tenure in Socage. 1 Inſt. 108.

8. If a Tenant by Eſcuage was, as often as Eſcuage was aſſeſſed by Parliament, to pay a Sum certain, this was a Tenure in Socage; for although the Money was not to be paid at a Time certain, a Sum certain was to be paid. 1 Inſt. 87. Bro. Ten. pl. 29.

9. Heretofore an Inheritance might have been holden by Tenure in Socage *in Capite*, as well as by Tenure in Socage.

10. But by the 12 *Car.* 2. *c.* 24. Tenure in Socage *in Capite*, is changed into Tenure in Socage.

11. Tenure in Socage is liable to no other Services than Fealty, and the Payment of the Thing due to the Lord.

TITHES.

THE Word *Tithe* is derived from the *Saxon* Word Teoða, which ſignifies the tenth Part of a Thing.

Of every Thing, of which Tithe is due of common Right, Tithe is always the tenth Part of the Thing.

But of every Thing, of which Tithe is only due by Cuſtom, more or leſs than the tenth Part of the Thing may be due for Tithe.

Under this Title it will be proper to ſhew,

(A) Of what Things Tithe is in the general due.
(B) Who are liable to the Payment of a perſonal Tithe.
(C) Of what Things a predial Tithe is due.

1. Of Agiſtment.
2. Of Corn.
3. Of Hay.
4. Of Wood.
5. Of divers other Things.

(D) Of what Things a mixed Tithe is due.

1. Of the Young of a Beaſt.
2. Of the Eggs or Young of a Bird or Fowl.
3. Of Wool.
4. Of divers other Things.

(E) To whom Tithe is in the general to be paid.
(F) To whom parochial Tithes are to be paid.
(G) To whom extraparochial Tithes are to be paid.
(H) Of the Right to a Portion of Tithes in a Pariſh.
(I) By whom Tithe is to be paid.
(K) What Tithes are to be deemed ſmall Tithes.
(L) How far the Cuſtom of a Pariſh is to be regarded in the ſetting out of Tithes.
(M) Of the Time and Manner of paying perſonal Tithes, where there is no Cuſtom in a Pariſh.
(N) Of the Time and Manner of ſetting out predial Tithes, where there is no Cuſtom in a Pariſh.
(O) Of the Time and Manner of ſetting out or paying mixed Tithes, where there is no Cuſtom in a Pariſh.

(P) Of

(P) Of the Time and Manner of paying Tithes due by Custom.
(Q) In what Cases the Payment of Tithes may be suspended.
1. Of the Produce of Lands in the King's Hands.
2. Of the Produce of Lands, which have been barren.
3. Of the Produce of Glebe Lands.
(R) Of a Modus Decimandi.
1. In the general.
2. Of the Certainty required in a *Modus*.
3. Of a *Modus*, which amounts to a Prescription in *Non decimando*.
4. Of a *Modus*, which has not been constantly paid.
5. Of a leaping *Modus*.
6. Of a *Modus*, which is too rank.
7. Of a *Modus*, which is liable to Fraud.
8. Of a *Modus* for such Persons as live out of the Parish.
9. Of the Extent of a *Modus*.
(S) Of a Prescription in Non decimando.
(T) Of a Discharge of Tithes by Grant.
(U) Of a Discharge of Tithes by Bull.
(W) Of a Discharge of the Payment of Tithes by Order.
(X) Of a Discharge of the Payment of Tithes by Unity of Possession.
(Y) Of Agreements and Leases concerning Tithes.
(Z) Of a Suit in a Spiritual Court for Subtraction of Tithe.
(Aa) In what Cases a Prohibition lies to a Suit in a Spiritual Court for Subtraction of Tithe.
(Bb) Of a Suit in a Court of Equity for Subtraction of Tithe.
(Cc) Of a Suit in a Court of Equity to establish a Modus, or a customary Manner of setting out Tithe.
(Dd) Of an Action upon the Statute against Subtraction of Tithe.
(Ee) Of recovering in a summary Way the Value of small Tithes subtracted.
(Ff) Of recovering Tithe due from Quakers.
(Gg) What Remedy the Occupier has, when the Person intitled to the Tithe set out does not fetch it away in a reasonable Time.

(A) Of what Things Tithes are in the general due.

1. TITHES of ſome Things are due of common Right, of others by Cuſtom.

2. Tithe is not due of common Right of any Fruit of the Earth, which does not renew annually.

11 Rep. 13. Cro. Eliz. 161, 216. Cro. Ja. 452. 3. Tithe, which ariſes from a Fruit of the Earth, can never be Part of the Land from which it ariſes, but muſt always be collateral thereto.

11 Rep. 13. Priddle v. Napier. Cro. Eliz. 161. 4. Nay Tithe is ſo collateral to the Land from which it ariſes, that if a Leaſe be made of the Glebe belonging to a Rectory, with all the Profits and Advantages thereof, and there be a Covenant, that the Rent to be paid ſhall be in full Satisfaction of every Kind of Exaction, and Demand, belonging to the Rectory; yet if the Glebe be not expreſsly diſcharged of Tithe, the Leſſee ſhall be liable to the Payment of Tithe for the Glebe.

Fitz. N. B. 53. Bro. Diſm. pl. 18. 5. Tithe is not due of common Right of the Produce of a Mine or Quarry: Becauſe ſuch Produce does not renew annually, but is the Subſtance of the Earth, and has perhaps been ſo for many Years.

2 Inſt. 651. 1 Roll. Abr. 637. Cro. Eliz. 277.

2 Vern. 46. Buxton v. Hutchinſon. 6. But Tithe may be due by Cuſtom of the Produce of a Mine or Quarry.

1 Roll. Abr. 637. pl. 5. 7. Tithe is not due of common Right of Lime: The Chalk, of which it is made, being Part of the Soil.

2 Mod. 77. Stoutfield's Caſe. 8. Tithe is not due of common Right of Bricks: Becauſe theſe are made of Earth.

1 Mod. 35. 9. Tithe is not due of common Right of Turf or Gravel: Becauſe both theſe are Part of the Soil.

Roll. Abr. 642. S. pl. 8. 10. It has been holden, that Tithe is not due of common Right of Salt: Becauſe this is not a Fruit of the Earth.

1 Roll. Abr. 642. S. pl. 7. pl. 8. 11. But every one of theſe Things, and all Things of the like Kind, may by Cuſtom be liable to the Payment of Tithe.

11 Rep. 16. Graunt's Caſe. 12. Tithe is not due of common Right of a Houſe; becauſe Tithe is only due of common Right of ſuch Things as renew annually.

2 Inſt. 659. 37 H. 8. c. 2. 13. But Houſes in *London* are by a Decree, which was confirmed by an Act of Parliament, made liable to the Payment of Tithe.

2 Inſt 659. Hard. 116. Gilb. Eq. Rep. 193, 194. 14. And before this Decree many Houſes in *London* were by Cuſtom liable to the Payment of Tithe; the Quantum to be paid being thereby only ſettled, as to ſuch Houſes for which there was no cuſtomary Payment.

11 Rep. 16. Graunt's Caſe. Bunb. 102. 15. There is in moſt antient Cities and Boroughs a Cuſtom to pay Tithe of Houſes; without which there would not be in many Pariſhes a proper Maintenance for the Clergy.

Bunb. 43. Earl of Scarborough v. Hunter. 16. It was holden by three Barons of the Exchequer, *Price*, *Montague* and *Page*, contrary to the Opinion of *Bury* Chief Baron, that two Tithes may be due of the ſame Thing, one of common Right, the other by Cuſtom.

(B) Who

(B) Who are liable to the Payment of a perſonal Tithe.

1. SUCH Tithe, as ariſes from the Profit of a Man's perſonal Labour, in the Exerciſe of an Art, Trade or Employment, is called a perſonal Tithe. 2 Inſt. 649.

2. A perſonal Tithe is only to be paid of the clear Gain, which ariſes from the perſonal Labour of a Man, after deducting all Charge and Expence, according to the Eſtate, Condition or Degree of the Man. 2 Inſt. 62.

3. By the 2 & 3 *Ed.* 6. *c.* 13. *par.* 7. Common Day-Labourers are exempted from the Payment of a perſonal Tithe.

4. Servants in Huſbandry are not liable to the Payment of a perſonal Tithe; for by their Labour the Tithes of many Things are increaſed. 1 Roll. Abr. 646. pl. 1.

5. A Miller is liable to the Payment of a perſonal Tithe. 2 Inſt. 621. 1 Roll. Abr. 641. pl. 19. Cro. Jac. 523.

6. And it ſeems to have been formerly holden, that the Occupier of a Corn Mill, beſides being liable to the Payment of a perſonal Tithe, is alſo liable to pay, as a predial Tithe, the tenth Part of his Toll. 2 Roll. Rep. 84. Show. 281. Brownl. 32.

7. It is however now ſettled, by a Decree of the Houſe of Lords, upon an Appeal from a Decree of the Court of Exchequer, that only a perſonal Tithe is due from the Occupier of a Corn Mill. 1 Eq. Caſ. Abr. 366. Newt. *v.* Chamberain. 2 Will. Rep. 463.

8. The Occupier of a new-erected Mill is liable to the Payment of a perſonal Tithe, although the Mill be erected upon Land diſcharged of Tithes. Cro. Ja. 429.

9. It is ſaid in one Book, that the Occupier of an antient Mill is not liable to the Payment of a perſonal Tithe: But that the Occupier of a new Mill is by the 9 *Ed.* 2. *ſt.* 1. *c.* 5. made liable thereto. Mar. 15. pl. 36.

10. This ſeems to be a Miſtake; for that Statute does only provide, that new-erected Mills ſhall be liable to the Payment of Tithe: But as nothing is therein ſaid concerning antient Mills, there can be no Doubt, that ſuch antient Mills, as before the making of that Statute were liable to the Payment of a perſonal Tithe, continued afterwards to be liable thereto. 12 Mod. 243. Hart *v.* Hale. 3 Bulſtr. 212.

11. If the Man who has let a Ship to a Fiſherman receive, for the Uſe of his Ship, a Parcel of the Fiſh which are caught; the Fiſherman is not liable to the Payment of a perſonal Tithe for theſe Fiſh, becauſe they are no Part of his Gain. 1 Roll. Abr. 656. N. pl. 2.

12. If a Man purchaſe a Houſe for three Hundred Pounds, and after ſell it for five Hundred, no perſonal Tithe is due; for the perſonal Labour bears no Proportion in this Caſe to the Profit. 1 Rol. Abr. 656. N. pl. 3.

13. If an Innkeeper have ſuch Profit out of his Kitchen, Cellar and Stables, as to make two Hundred Pounds of what coſt him only one Hundred, no perſonal Tithe is due: Becauſe the Profit did not in this Caſe ariſe from perſonal Labour alone, and ſo far as it did, it aroſe perhaps more from the perſonal Labour of Servants than from that of the Maſter of the Inn. 2 Bulſtr. 141. Dolley *v.* Davis.

(C) Of what Things a predial Tithe is due.

2 Inſt. 649. 1. SUCH Tithe, as ariſes immediately from a Fruit of the Earth, as from Corn, Hay, Hemp or Hops, or from any Kind of Fruit, Seed or Herb, is called a predial Tithe.

2 Inſt. 647. 2. It is ſo called becauſe it ariſes immediately from a Fruit of the Farm or Earth.

4 Mod. 344. 3. Divers Things are by the Eccleſiaſtical Law liable to the Payment of a predial Tithe, which by the Common Law are not.

4. The Deſign under this Head is to ſhew, what Things are liable by the Common Law to the Payment of a predial Tithe.

1 Roll. Abr. 637. E. pl. 2. 1 Roll. Abr. 642. S. pl. 7. pl. 8. 5. In doing this it will appear, that ſome Things, which are in the general exempted therefrom, become by Cuſtom liable to the Payment of a predial Tithe.

1 Roll. Abr. 645. pl. 11. Cro. Eliz. 475. Freem. 335. 12 Mod. 235. 6. It will alſo appear, that ſome Things, which are in the general liable thereto, are under particular Circumſtances exempted from the Payment of a predial Tithe.

Cro. Eliz. 475. Freem. 335. 7. But wherever any Fraud is uſed, to bring a Thing under a Circumſtance, by reaſon of which it would, if it had come fairly thereunder, have been exempted from the Payment of a predial Tithe, it is by ſuch Fraud rendered liable thereto.

8. As it would be tedious, to enumerate all the Things which are liable to the Payment of a predial Tithe, only thoſe ſhall be mentioned, concerning the Tithe of which ſome Queſtion has ariſen: But from thoſe which ſhall be mentioned, it may be eaſily collected, of what other Things a predial Tithe is due.

1. Of Agiſtment.

9. Agiſting, in the ſtrict Senſe of the Word, means depaſturing a Beaſt the Property of a Stranger: But the Word, in the legal Senſe thereof, does as well mean depaſturing the Beaſt of the Occupier of the Land, as depaſturing the Beaſt of a Stranger.

1 Roll. Abr. 646. pl. 2. pl. 3. pl. 6. pl. 7. Cro. Eliz. 446. Ld. Raym. 130. 10. An Occupier of Land is not liable to the Payment of Tithe, for depaſturing Horſes, or other Beaſts uſed in Huſbandry, in the Pariſh in which they are depaſtured: Becauſe the Tithe of other Things is by the Work of ſuch Beaſts increaſed.

7 Mod. 114. Harrow's Caſe. Ld. Raym. 130. 11. But if Horſes or other Beaſts are uſed in Huſbandry, out of the Pariſh in which they are depaſtured, an Agiſtment Tithe is due for ſuch Beaſts.

1 Roll. Abr. 642. pl. 4. Cro. Ja. 430. Bulſtr. 171. Runb. 3. 12. It ſeems to be the better Opinion, that Tithe is not due for depaſturing a Saddle-Horſe, which an Occupier of Land keeps for himſelf or Servant to ride upon.

13. But

13. But an Occupier of Land is liable to an Agiſtment Tithe, for depaſturing a Horſe, which he keeps for Sale. Cro. Ja. 430. Hampton *v.* Wild. 1 Roll. Abr. 647. pl. 14.

14. Tithe is not due for depaſturing milch Cattle, which are milked in the Pariſh in which they are depaſtured; becauſe Tithe is paid of their Milk. 1 Roll. Abr. 646. pl. 2. Cro. Eliz. 446.

15. If Cows are reſerved for Calving, Tithe is not due for depaſturing them whilſt they are dry: But if they are afterwards ſold, or milked in anorher Pariſh, an Agiſtment Tithe is due for the Time they were dry. Hetl. 100.

16. Tithe is not due from an Occupier of Land for depaſturing young Cattle, which are reared to be uſed in Huſbandry, or to be milked. Cro. Eliz. 476. Sherington *v.* Flewood.

17. But if ſuch young Beaſts are ſold, before they come to ſuch Perfection as to be fit for Huſbandry, or before they give Milk, Tithe is to be paid for depaſturing them. Hetl. 86. Woolmerſton's Caſe.

18. An Occupier of Land is liable to Tithe, for depaſturing Cattle, which he keeps for Sale. Jenk. 281. pl. 6. Cro. Car. 237. Show. P. C. 192.

19. If Cattle, which have neither being uſed in Huſbandry nor been milked, are, after having been kept ſome Time, killed to be ſpent in the Family of the Occupier of the Land on which they were depaſtured, Tithe is not due for depaſturing them. Jenk. 281. pl. 6. Cro. Eliz. 446, 476. Cro. Car. 237.

20. It is in general true, that Tithe is due for depaſturing Cattle, which are the Property of a Stranger. Cro. Eliz. 476. Bunb. 1. Freem. 329.

21. If an Innkeeper put the Horſe of his Gueſt into a Puſture in his own Occupation, he is liable to Tithe for depaſturing the Horſe. Hardr. 35. Guibert *v.* Everſley. Poph. 142.

22. Tithe is not due for depaſturing any Beaſt, upon Land which has in the ſame Year paid Tithe of Hay. Poph. 142. 2 Roll. Rep. 191.

23. Tithe is not due for depaſturing any Beaſt upon the Headland of a ploughed Field; provided the Headland be not wider, than is ſufficient to turn a Plough and Horſes upon. 1 Roll. Abr. 646. pl. 15.

24. Tithe is not due for depaſturing Cattle upon Land which has in the ſame Year paid Tithe of Corn. Bro. Diſm. pl. 18.

25. If Land, which has paid Tithe of Corn in one Year, be left unſown the next Year, Tithe is not due for depaſturing a Beaſt upon the Land; becauſe, by its lying freſh, the Tithe of the next Crop of Corn is increaſed. 1 Roll. Abr. 642. pl. 9.

26. But if Land, which has paid Tithe of Corn, be ſuffered to lie freſh longer than by the Courſe of Huſbandry is uſual, Tithe is due for depaſturing a Beaſt upon the Land. Sheph. Abr. 1008.

27. As the Queſtions, whether Tithe is due for depaſturing Sheep, and in what Caſes it is due, do not ſeem to be ſettled, it will not be amiſs, to mention the principal Caſes, in which theſe Queſtions have been agitated.

28. It is laid down in one Caſe, that Tithe is not due for depaſturing Sheep; becauſe they are *Animalia fructuoſa*. 1 Roll. Rep. 63. pl. 7. Maſcal *v.* Price, Mich. 12 Ja. 1.

29. But in another Book, of the ſame Author's, where this Caſe is mentioned, there is a *Dubitatur*. 1 Roll. Abr. 642. R pl. 8.

30. In

Poph. 197. Anon. Mich. 2 Car. 1.

30. In a Caſe not long after it was holden, that Tithe ſhould be paid for Sheep, which after having been depaſtured in one Pariſh from *Michaelmas-Day* to *Lady-Day* were removed into another; and by *Dodderidge* Juſtice, otherwiſe the Parſon of the firſt Pariſh may be defrauded of this Tithe; for the Sheep, which have been carried into a ſecond Pariſh, may not be brought back and ſheared in the firſt.

31. It was however ſaid in this Caſe by *Whitelock* Juſtice, that *De Animalibus inutilibus*, as Horſes, Oxen, *&c.* the Parſon ſhall have Agiſtment Tithe: But that *De Animalibus utilibus*, as Cows, Sheep, *&c.* he ſhall have Tithe in Kind.

Cro. Car. 237. Facy *v.* Long, Mich. 7 Car. 1.

32. In one Caſe it is ſaid to have been holden, that Tithe is not to be paid for depaſturing Sheep, which are afterwards eaten in the Houſe of the Occupier of the Land.

33. It would follow, as a neceſſary Implication from the Doctrine of this Caſe, that Tithe is due for depaſturing Sheep, which are not afterwards eaten in the Houſe of the Occupier of the Land.

1 Roll. Abr. 647. pl. 13.

34. But in another Report of the ſame Caſe it is ſaid to have been holden, that Tithe is not due for depaſturing Wethers; becauſe they will yield a Tithe of Wool.

Bunb. 90. Baker *v.* Sweet, Mich. 8 G. 1.

35. In one modern Caſe in the Court of Exchequer it is ſaid, that it ſeemed to be admitted, that Tithe is due for depaſturing yearling Sheep.

Gilb. Rep. in Eq 231. Coleman *v.* Baker, Paſch. 12 Geo. 1.

36. In another Caſe ſhortly after in the ſame Court it appeared, that Sheep, after paying Tithe of Wool, had been ſed upon Turnips not ſevered, by which they were bettered to the Value of five Shillings each; and that they were then ſold. It alſo appeared, that the Defendant had, before the next Shearing-Time, bought in as many as were ſold; and that of theſe Tithe of Wool was paid. It was inſiſted, that if an Agiſtment Tithe were to be paid for the Sheep ſold, and Tithe of Wool for thoſe bought, this would be a double Tithing. But the Court decreed the Defendant to account for an Agiſtment Tithe for the Sheep ſold.

37. In the latter Caſe, the Caſe of *Dummer* and *Wingfield*, *Hil.* 1 *W. & M.* was mentioned. In which it had been decreed, and the Decree had been affirmed upon a Rehearſing, that Tithe, for depaſturing Sheep, from the Time they were ſheared until they were ſold, ſhould be accounted for.

Bunb. 313. Poor *v.* Seymour, Hil. 5 Geo. 2.

38. In a ſtill later Caſe, the Court of Exchequer were of a quite different Opinion. A Bill being brought, for the Tithe of depaſturing Sheep four Months in a Pariſh after they had been ſhorn and Tithe of their Wool had been paid in that Pariſh, it appeared, that at the End of the four Months they were removed into another Pariſh, and that they were ſhorn there at the next ſhearing-Time. In this Caſe the Caſes of *Coleman* and *Baker*, and of *Dummer* and *Wingfield*, were cited by the Plaintiff's Counſel: But the Court decreed, that Tithe ſhould not be paid for depaſturing Sheep; becauſe they are *Animalia fructuoſa*.

Of Corn.

1 Roll. Abr. 645. pl. 11. Cro. Eliz. 475. Moor 278. Freem. 335.

39. It is laid down in divers Caſes, that Tithe is not due of the Rakings of Corn involuntarily ſcattered.

Cro. Eliz. 475. Freem. 335.

40. But if more Corn be fraudulently ſcattered, than if proper Care had been taken would have been ſcattered, Tithe is due of the Rakings of the Corn.

12 Mod. 235.

41. It is ſaid by *Holt* Chief Juſtice, that Tithe is due of the Rakings of all Corn, except ſuch as is bound up in Sheaves.

3. Of

3. Of Hay.

42. Hay is liable to the Payment of Tithe, notwithſtanding Beaſts of the Plough or Pail, or Sheep, are to be fed therewith. Cro. Ja. 47. Webb *v.* Warner. 1 Roll. Abr. 650. pl. 12. 12 Mod. 497.

43. But Tithe is not due of Hay grown upon the Headland of a plough-ed Field; provided the Headland be not wider, than is ſufficient to turn a Plough and Horſes upon. 1 Roll. Abr. 646. pl. 19.

44. It is laid down in one Caſe, that if a Man cut Graſs, and while it is in the Swarthe carry it, and feed his Plough Cattle therewith, not having ſufficient Suſtenance for them otherwiſe, Tithe is not due thereof. 1 Roll. Abr. 645. Crawley *v.* Wells, Mich. 9. Car. 1.

45. And in a much later Caſe, the Court of Exchequer ſeemed to be of Opinion, that Tithe is not due of Vetches or Clover, cut green and given to Cattle uſed in Huſbandry. Bunb. 279 Hayes *v.* Dowſe, Hil. 3 Geo. 2.

46. But in a Caſe ſome Years prior to the latter Caſe it was holden, that a Right to Tithe of Hay accrues upon the mowing of the Graſs, and that the ſubſequent Application thereof, either while it is in Graſs, or after it is made into Hay, ſhall not, although Beaſts of the Plough or Pail are fed therewith, take away the Right. 2 Mod. 498. Selby *v.* Bank, Paſch. 13 W. 3.

47. And the Doctrine of the laſt Caſe coincides with that of an old Caſe; in which it is laid down, that Tares cut green, and given to Beaſts of the Plough, may by ſpecial Cuſtom be exempted from the Payment of Tithes: From whence it follows, that ſuch Tares are not in the general exempted therefrom. Cro. Car. 393. Mead *v.* Thurman, Hil. 10 Car. 1.

48. It is laid down in divers Books, that Tithe is not due of After-mowth Hay, becauſe Tithe can only be due once in the ſame Year from the ſame Land. 2 Inſt. 652. Cro. Ja. 42. Ld. Raym. 243.

49. But it is in other Books laid down, that Tithe is due of Aftermowth Hay. Cro. Eliz. 660. Cro. Ja. 116. Cro. Car. 403. 12 Mod. 498. Bunb. 10.

50. And it has been holden in two modern Caſes, that if divers Crops are grown upon the ſame Land in the ſame Year, Tithe is to be paid of every Crop. Bunb. 10. Benſon *v.* Watkins, Hil. 3 Geo. 1. Bunb. 314. Swinſen *v.* Digby, Hil. 3 Geo. 2.

Of Wood.

51. It is ſaid in one Caſe, that before the Conſtitution of *Stratford*, Wood was only tithable in particular Places by Cuſtom; becauſe Wood does not renew annually. 12 Mod. 111.

52. By that Conſtitution, which was made in the ſeventeenth Year of the Reign of *Edward* the Third, it was ordained, that Tithes ſhould be paid, within the Province of *Canterbury*, of *Silva Cædua*. 2 Inſt. 642.

53. In the next Year, the Commons complained to the King of that Conſtitution, as an unprecedented Thing; and petitioned, that the People might remain in the ſame State as they had been under his Royal Progenitors; and that a Prohibition might be granted, for all who ſhould be impleaded in Court Chriſtian for Tithe of Wood. Ibid.

54. The Anſwer was, The King willeth that Law and Reaſon be dore Ibid.

55. In

2 Inſt. 642. 55. In another Petition, preſented in the twenty-firſt Year of the ſame Reign, the Commons complained to the King, that the Clergy, by virtue of the Conſtitution made in the ſeventeenth Year of his Reign, demanded Tithes both of groſs Wood and Underwood, whether the latter were ſold or not.

Ibid. 56. To this the King anſwered, That the Archbiſhop of *Canterbury* and the other Biſhops have anſwered, that Tithe is only demanded, by Virtue of that Conſtitution, of Underwood.

57. After other Petitions had been in vain preſented by the Commons, the great Men of the Realm did, in the Forty-fifth Year of the ſame Reign, join with the Commons in a Petition.

45 Ed. 3. c. 3. 58. In Conſequence of this Petition, a Statute was in the ſame Year made in the following Words, "At the Complaint of the great Men and Commons, ſhewing by their Petition, that when they ſell their groſs Wood, "of the Age of twenty or forty Years, or of a greater Age, to Merchants, "to their own Profit, and to the Aid of the King in his Wars, the Parſons "and Vicars of Holy Church do implead, and trouble the ſaid Merchants "in Court Chriſtian, for the Tithes of the ſaid Wood, under the Denomination of *Silva Cædua*, by Reaſon of which they cannot ſell their Wood "for the real Value, to the great Damage of themſelves, and the Realm, it "is ordained and eſtabliſhed, that a Prohibition in this Caſe ſhall be "granted, and upon the ſame an Attachment, as it hath hitherto been."

2 Inſt. 642. 45 Edw. 3. c. 3. Plowd. 470. Bro. Paroch. pl. 1. Cro. Ja. 100. 59. From theſe Petitions and Anſwers and this Statute it appears plainly, that the Demand of Tithe of Wood, by Virtue of the Conſtitution made in the ſeventeenth Year of the Reign of *Edward* the Third, was at leaſt as to groſs Wood an Encroachment.

2 Inſt. 643, 644, 645. 60. After the making of this Statute, Prohibitions were conſtantly granted to Suits inſtituted in Spiritual Courts for Tithe of groſs Wood: But two Queſtions did frequently ariſe; namely, What is groſs Wood? and of what Age groſs Wood muſt be, before it is exemped from the Payment of Tithe.

2 Inſt. 642, 643. Cro. Eliz. 1. 1 2 Mod. 524. 61. For the putting of an End to theſe Queſtions it has been long ſettled, that by groſs Wood is not meant high or large Wood, but ſuch Wood as is generally, or by the Cuſtom of a particular Part of the Country, uſed as Timber; and that all ſuch Wood, if it be of the Age of twenty Years, is exempted from the Payment of Tithe.

2 Inſt. 642. 62. The Wood of Oaken, Aſhen and Elmen Trees, being univerſally uſed as Timber, it has been conſtantly holden, that ſuch Trees, if of the Age of twenty Years, are groſs Wood.

2 Inſt. 643. 63. It was holden upon great Deliberation, notwithſtanding what is laid down to the contrary in *Plowd.* 470. that Hornbeam Trees, if of the Age of twenty Years, are groſs Wood; becauſe the Wood of ſuch Trees is frequently uſed in Building and Repairing.

2 Inſt. 643. 64. It has for the ſame Reaſon been holden, that an Aſpen Tree, if of the Age of twenty Years, is groſs Wood.

Plowd. 470. Cro. Eliz. 1. Cro. Ja 199. 1 Roll. Abr. 640. pl. 5. pl. 6. Brownl. 94. 65. Tithe is in the general due of Beechen, Birchen, Hazel, Willow, Sallow, Alder, Maple, and Wite-Thorn Trees, and of all Fruit Trees of what Age ſoever they are: Becauſe the Wood of theſe Trees is not often uſed as Timber.

Hob. 219. Brownl. 94. 66. But if the Wood of any of theſe Trees be frequently uſed, in a particular Part of the Country where Timber is ſcarce, in building or repairing, Tithe is not due of ſuch Trees, if they are of the Age of twenty Years.

67. It

67. It is laid down in divers Caſes, that if a Timber Tree, after it is of the Age of twenty Years decay ſo as to be of no Uſe for repairing or building, Tithe is not due of the Wood of this Tree; becauſe it was once privileged. 11 Rep. 48. Cro. Eliz. 477. Cro. Ja. 100. 1 Roll. Abr. 640. pl. 2.

68. But the contrary is laid down in ſome other Caſes.

69. In two of theſe it is laid down, that, if the Wood of a Coppice has been uſually felled for Firing, ſuch Wood ſhall pay Tithe, although it ſtand till it be forty Years of Age. Sid. 300. 1 Lev. 189.

70 In another it is laid down, that if the Wood of a Timber Tree be ſold for Firing, it is, although the Tree be of the Age of twenty Years, liable to the Payment of Tithe. Bunb. 99. Greenaway *v.* The Earl of Kent, Hil. 7 G. 1.

71. The Doctrine however of the former cited Caſes has been confirmed in a modern Caſe.

72. A Bill being brought for Tithe of the Loppings of Timber Trees, which had been ſold for Firing, it was inſiſted that this Wood, which would otherways have been exempted from the Payment of Tithes was liable thereto, becauſe it was ſold for Firing; and ſome of the Caſes above cited were replied upon. MS. Rep. Walton *v.* Tryon, Mich. 25 Geo. 2.

73. The Bill was diſmiſſed; and by Lord *Hardwicke* Chancellor.

74. In the Caſes in 1 *Lev.* 189. and *Sid.* 300. the Wood in Queſtion was Coppice Wood, which had been uſually felled for Firing; and conſequently theſe Caſes do not conclude to the Point: Becauſe ſuch Wood of what Age ſoever it be is titheable. What is laid down in the Caſe of *Greenaway* and *The Earl of Kent* is not now Law; for in the Caſe of *Bibye* and *Huxley*, *Hil.* 11 *Geo.* 1. which was ſubſequent thereto, it was agreed, that Tithe is not due of the Wood of a Timber Tree, which has been once privileged from the Payment of Tithe, although ſuch Wood be ſold for Firing.

75. It is in one Book laid down, that the Loppings of a Timber Tree, which are of twenty Years Growth, are exempted from the Payment of Tithe; becauſe Loppings of that Age may be uſual in Building. Plowd. 470. Soby *v.* Molins.

76. But it is laid down in divers other Books, that if a Timber Tree, of the Age of twenty Years, be lopped, Tithe is not to be paid of the Loppings, although they are not of twenty Years Growth; for that as the Tree is exempted from the Payment of Tithe, the Loppinge are likewiſe exempted. Bro. Diſm. pl. 14. 11 Rep. 48. Cro. Eliz. 478. Godb. 175. 1 Roll. Abr 640. pl. 3.

77. And the Doctrine of the latter cited Books was confirmed in the Caſe of *Walton* and *Tryon*.

78. In this Caſe it appeared, that the Loppings of the Trees, for the Tithe of which the Bill was brought, were not of twenty Years Growth: But it appeared, that the Trees were of the Age of twenty Years, before they had ever been lopped. It was decreed by Lord *Hardwicke* Chancellor; that Tithe was not due of the Loppings; for that if a Tree be once privileged from paying Tithe, the Priviledge extends to all future Loppings, of whatſoever Age they are.

79. It has been holden, that although a Tree was lopped, before it was of the Age of twenty Years, the future Loppings of the Tree, if they are of twenty Years Growth, are not liable to the Payment of Tithe. 1 Roll. Abr. 640. pl. 1.

80 But in the Caſe of *Walton* and *Tryon*, it was laid down by Lord *Hardwicke* Chancellor; that if a Tree was lopped, before it was of the Age of twenty Years, all future Loppings, of how many Years Growth ſoever they may be, are liable to the Payment of Tithe.

81. It

11 Rep. 48. Liford's Caſe.

81. It has been holden, that if a Tree, which was privileged from paying Tithe, be felled, the Germins that ſpring from the Root of the Tree, are likewiſe privileged.

82. But in the Caſe of *Walton* and *Tryon*, it was laid down by Lord *Hardwicke* Chancellor; that all Germins, which ſpring from the Roots of Trees that have been felled, are liable to the Payment of Tithe.

1 Lev. 189. Sid. 300.

83. The Wood of a Coppice, which has uſually been felled for Firing, is liable to pay Tithe, although the ſame be of the Age of forty Years.

84. And in the Caſe of *Walton* and *Tryon*, it was laid down by Lord *Hardwicke* Chancellor; that if, when the Wood of a Coppice is felled, ſome Trees growing therein, which are of the Age of twenty Years and have never been lopped, are lopped, and the Loppings are promiſcuouſly bound up in Faggots with the Coppice Wood, Tithe muſt be paid of the whole: For that it would be very difficult to ſeparate the titheable Wood from that which is not ſo, and the Owner ought to ſuffer for his Folly, in mixing the latter with the former.

11 Rep. 48. Liford's Caſe.

85. If a Tree, or the Lopping of a Tree, is exempted from the Payment of Tithe, the Bark of the Tree or Lopping is likewiſe exempted.

Freem. 334.

86. The Words *Silva Cædua* are ſometimes uſed, as if they ſignified the ſame as the Words *Underwood:* But the former Words are of a much larger Signification; for under the Words *Silva Cædua* is included every Sort of Wood, except groſs Wood of the Age of twenty Years.

87. It appears, from what has been already mentioned, that Tithe is in the general due of *Silva Cædua*.

1 Roll. Abr. 637. pl. 6. Cro. Car. 526.

88. If young Trees are taken out of a Nurſery in one Pariſh, and ſold to be planted in another Pariſh, Tithe is due thereof; elſe the Parſon might be deprived of the Tithes of his whole Pariſh, by converting the Land into Nurſeries,

Hardr. 380. Grant *v.* Hadding.

89. And it is in one Caſe laid down, that Tithe is due of young Trees taken out of a Nurſery, although they are ſold to be planted in the ſame Pariſh.

90. But although it be in the general true, that *Silva Cædua* is liable to the Payment of Tithes, yet ſuch Wood is under certain Circumſtances exempted therefrom.

1 Roll. Abr. 645. pl. 8. pl. 9.

91. If *Silva Cædua* be uſed in the Pariſh wherein it grew, to Burn Bricks for the repairing or neceſſary enlarging of the Houſe of a Pariſhioner, Tithe is not due thereof.

1 Roll. Abr. 645. pl. 10.

92. But if ſuch Wood be uſed, to Burn Bricks for the enlarging a Houſe more than is neceſſary for the Family of the Pariſhioner, Tithe is due thereof.

Cro. Eliz. 609. Auſtin *v.* Lucas, Paſch. 40 Eliz. Ellis *v* Drake, Paſch. 14 Ja. 1.

93 It is laid down in two Caſes; that *Silva Cædua* is exempted from the Payment of Tithe, when it is burnt in the Houſe of an Inhabitant of the Pariſh wherein it grew.

Sid. 447. Tilden *v.* Waller, Paſch. 22 Car. 1. 1 Ventr. 75.

94. But in a Caſe, not many Years ſubſequent to theſe, it is laid down, that ſuch Wood is only exempted from the Payment of Tithe, when it is burnt in the Houſe of a Pariſhioner, who occupies Land in the Pariſh wherein it grew.

Freem. 335. Anon. Mich. 11 W. 3.

95. And from a ſtill later Caſe it may be inferred, that ſuch Wood is only exempted from the Payment of Tithe, when it is burnt, in the Houſe of an Occupier of Land in the Pariſh in which it grew, for the neceſſary Uſe of his Family; for it is therein laid down, that if the Wood be uſed for drying Hops, of which the Parſon has no Benefit, his Tithe of Hops having been ſet out before the Hops were dried, Tithe muſt be paid thereof.

96. If

96. If an Occupier of Land, in a Pariſh where Tithe of Wood and Tithe of Corn are both due to the ſame Perſon, uſe *Silva Cædua*, for incloſing his own Corn Land, which lies in the Pariſh wherein the Wood grew, Tithe is not due of the Wood; becauſe this is uſed for the Preſervation of Corn whereof Tithe is due. 1 Roll. Abr. 644. pl. 2. Ld. Raym. 130.

97. But if ſuch Wood be uſed for incloſing the Corn Land of another Perſon, Tithe is due thereof; notwithſtanding the Perſon, who is intitled to the Tithe of the Wood, is likewiſe intitled to the Tithe of the Corn grown upon the Land incloſed. 1 Saund. 143. Croucher *v.* Collins.

98. If the Tithe of Hops and the Tithe of Wood are both due to the ſame Perſon, Tithe is not due of *Silva Cædua* uſed in poling the Hops: Becauſe the Tithe of the Hops is increaſed by the Uſe of the Poles. Freem. 334. Anon. Bunb. 20.

99. Tithe is not due of *Silva Cædua*, uſed in making or repairing Carts or Ploughs to be uſed in Huſbandry in the Pariſh wherein the Wood grew: Becauſe by the Uſe of the Carts and Ploughs the Tithes of other Things are increaſed. Goldſ. 93. Anon.

5. Of divers other Things.

100. It is laid down in one Book, that Tithe is to be paid of Acorns, although the Trees, upon which they grew, would not be liable to the Payment of the Tithe: Becauſe the Acorns are an annual Increaſe. 11 Rep. 49. Liford's Caſe.

101. But in two other Books it is laid down, that Tithe is not due of Acorns, unleſs they are gathered and ſold. Lit. Rep. 40. Hetl. 27.

102. All Kinds of Flowers and Roots, whether they grew in a Garden or a Field, are liable to the Payment of Tithes. Lit. Rep. 148. Stile's Caſe.

103. Fruit of every Kind, although it grew upon a Tree in the Hedge of a Field, is liable to the Payment of Tithe. 2 Inſt. 621. Bunb. 184.

104. Furze is not liable to the Payment of Tithe, if it be burnt in the Houſe of a Pariſhioner, who occupies Land in the Pariſh wherein it grew. Lit. Rep. 368. Rooket *v.* Gomerſel.

105. But if a Furze be ſold, it is liable to the Payment of Tithe. Ibid.

106. If a Man gather green Peas, to eat in his Houſe, Tithe is not due thereof. 1 Roll. Abr. 647. pl. 11.

107. But if a Man gather green Peas, to ſell or to feed Hogs with, they are liable to the Payment of Tithe. 1 Roll. Abr. 647. pl. 12.

108. In one modern Caſe, it ſeems to have been the Opinion of the Court, that Turnips are only liable to pay Tithe, when they are drawn. Bunb. 10. Benſon *v.* Watkins, Hil. 3 Geo. 1.

109. But in a more modern Caſe it was holden, that although Turnips are not drawn, but are fed off the Ground, Tithe is due thereof, in Caſe they are eaten by unprofitable Cattle. Bunb. 314. Swinſen *v.* Digby, Hil. 5 Geo. 2.

(D) Of what Things a mixed Tithe is due.

1. SUCH Tithe, as ariſes from a Beaſt, Bird or Fowl, is called a mixed Tithe. 2 Inſt. 649. 1 Roll. Abr. 635.

2. Divers Things are, by the Eccleſiaſtical Law, liable to the Payment of a mixed Tithe, which by the Common Law are not. 2 Inſt. 621. 4 Mod. 344.

3. The Deſign under this Head is to ſhew, of what Things a mixed Tithe is due at the Common Law.

4. In

1 Roll. Abr. 635. C. pl. 3. 636. pl. 7. CroCar. 339. 1 Ventr. 5.

4. In doing this it will appear, that ſome Things, which are in the general exempted therefrom, become by Cuſtom liable to the Payment of a mixed Tithe.

1 Roll. Abr. 645. pl. 14. pl. 16.

5. It will alſo appear, that ſome Things, which are in the general liable thereto, are under particular Circumſtances exempted from the Payment of a mixed Tithe.

1 Roll. Abr. 645. pl. 15. 646. pl. 17.

6. But wherever any Fraud is uſed, to bring a Thing under a Circumſtance, by Reaſon of which it would, if it had come fairly thereunder, have been exempted from the Payment of a mixed Tithe, it is by ſuch Fraud rendered liable thereto.

7. As it would be tedious, to enumerate all the Things which are liable to the Payment of a mixed Tithe, only thoſe ſhall be mentioned, concerning the Tithe of which ſome Queſtion has ariſen: But from thoſe which ſhall be mentioned, it may be eaſily collected, of what other Things a mixed Tithe is due.

1. Of the Young of a Beaſt.

8. It is in the general true, that Tithe is due of the Young of a Beaſt, which is not *Feræ Naturæ*.

Bro. Diſm. pl. 20.

9. But Tithe is not due of the Young of a Hound, an Ape, or of any Beaſt which is kept only for Pleaſure.

2 Inſt. 651.

10. Tithe is not due of the Young of a Deer; for a Deer is *Feræ Naturæ*.

1 Roll. Abr. 635. C. pl. 3. CroCar. 339. 1 Ventr. 5.

11. And for the ſame Reaſon, Tithe is not due of the Young of a Coney.

2. Of the Eggs and Young of a Bird or Fowl.

1 Roll. Abr. 642. pl. 6. 2 Will. Rep. 463.

12. It is in the general true, that Tithe is due of the Young of a Bird or Fowl which is not *Feræ Naturæ*, unleſs the Eggs of the Bird, or Fowl, have before paid Tithe.

Bro. Diſm. pl. 20.

13. But Tithe is not due of the Eggs or Young of a Bird, or Fowl, which is kept only for Pleaſure.

Moor 599. 2 Will. Rep. 463.

14. Tithe is not due of the Eggs or Young of a Partridge or Pheaſant; becauſe theſe are *Feræ Naturæ*.

1 Roll. Abr. 636. pl. 5.

15. If a Man keep Pheaſants, whoſe Wings are clipped, in an incloſed Wood, and from their Eggs hatch and bring up young Pheaſants, Tithe is not due of the young Pheaſants, although none were paid of the Eggs: Becauſe the old Pheaſants are not reclaimed, and would go out of the Incloſure, if their Wings were not clipped.

Moor 599. Hugton v. Price.

16. It was heretofore holden, that neither the Eggs nor young of a Turkey are liable to the Payment of Tithe; becauſe Turkies are *Feræ Naturæ*.

2 Will. Rep. 463. Carleton v. Brightwell.

17. But it was holden in a modern Caſe, that, as Turkies are at this Day as tame as Hens or any other Poultry, Tithe is due of the Eggs or Young of a Turky.

1 Roll. Abr. 644. Z. pl. 4. pl. 6. 1 Ventr. 5. 2 Mod. 77. 12 Mod. 47.

18. Tithe is not due of Young Pigeons, in Caſe they are ſpent in the Houſe of the Occupier of Land who breeds them.

1 Roll. Abr. 644. Z. pl. 5. pl. 6.

19. But if young Pigeons are ſold, Tithe is due thereof.

3. Of Wool.

20. If a Man pay the Tenth Lamb as Tithe at *Mark-tide*, and at *Midſummer* ſhear the other nine Lambs, Tithe is due of the Wool: For although there were only two Months, between the Time of paying the Tithe Lambs, which were not ſhorn, and the Shearing of the Reſidue, there is a new Increaſe. 1 Roll. Abr. 642. R. pl. 7. Bunb. 90.

21. If a Man ſhear his Sheep about their Necks at *Michaelmas*, to preſerve their Fleeces from the Brambles, Tithe is not due of the Wool: For it appears, that this, it being done before their Wool is much grown, could not be done for the Sake of the Wool. 1 Roll. Abr. 645. pl. 16.

22. If a Man, after their Wool is much grown, ſhear his Sheep about their Necks, in order to preſerve them from Vermin, Tithe is not due of the Wool. 1 Roll. Abr. 645. pl. 16.

23. If a Man, a little before ſhearing Time, cut dirty Locks of Wool from his Sheep, in order to preſerve them from Vermin, Tithe is not due of the Wool. 1 Roll. Abr. 646. pl. 17.

24. But if in either Caſe more Wool, than ought to have been cut off, be fraudulently cut off, Tithe is due of the Wool. 1 Roll. Abr. 645. pl. 15. 646. pl. 17.

25. It is laid down in one Caſe, that Tithe is not due of the Wool of a Sheep, killed to be ſpent in the Houſe, or of the Wool of a Sheep which dies of itſelf. Lit. Rep. 31. Civil v. Scot, Paſch. 3 Car. 1.

26. But in another Caſe, a few Years after, it is laid down, that Tithe is due of the Wool of a Sheep, killed to be ſpent in the Houſe. 1 Roll. Abr. 646. pl. 18. Dent v. Salvin, Paſch. 14 Car. 1.

4. Of divers other Things.

27. Fiſh taken out of a Pond, or an incloſed River, are liable to the Payment of Tithe.

28. But no Tithe is due of Fiſh taken out of the Sea, or an open River, although they are taken by a Perſon having a ſeveral Fiſhery; becauſe Fiſh are *Feræ Naturæ*. Noy 108. 1 Roll. Abr. 636. pl. 4. pl. 6. pl. 7. Cro. Car. 339. 1 Lev. 179. Sid. 278.

29. Honey and Bees-wax are liable to the Payment of Tithe. Fitz. N. B. 51. 1 Roll. Abr. 635. C. pl. 1. Cro. Car. 559.

30. But wherever Tithe of the Honey and Wax of Bees has been paid, no Tithe is due of the Bees. Cro. Car. 404. Anon.

31. Tithe is not due of the Milk, ſpent in the Houſe of a Farmer; in Caſe the Houſe ſtand in the Pariſh, wherein the Cows are Milked. Ld. Raym. 129. Scoles v. Lowther.

(E) To whom Tithe is in the general to be paid.

1. IT is laid down in divers Books, that only Spiritual Perſons were at the Common Law capable of receiving Tithes; becauſe Tithes are an Eccleſiaſtical Inheritance. 2 Rep. 45. 11 Rep. 13. Cro. Eliz. 293, 599, 763. Hob. 296.

2. As

2 Rep. 44. 2 Inſt. 648. Cro. Eliz. 512.

2. As a Layman had not, before the 32 *H.* 8. *c.* 7. any Remedy in the Caſe of Subtraction of Tithe. It follows that a Layman was not at the Common Law capable of acquiring a Right to Tithe; for wherever there is a Right, there muſt be a Remedy for the Recovery thereof.

Cro. Eliz. 293, 599, 763. 2 Rep. 44.

3. The King was indeed at the Common Law capable of receiving Tithe, becauſe he is *Perſona mixta*; but he could only receive them in his Spiritual Capacity, and not as belonging to a Manor.

2 Rep. 44. Biſhop of Wincheſter's Caſe.

4. It is laid down, that the King's Grantee, although a Layman, was at the Common Law capable, by Virtue of the King's Prerogative, of receiving Tithe.

1 Roll. Abr. 645. J. pl. 2. Hardr. 315.

5. But it ſeems to be the better Opinion; that as the King himſelf is only capable of receiving Tithe in his Spiritual Capacity, and not by Virtue of his Prerogative, the Capacity of receiving Tithe, it being perſonal, cannot be conveyed to a Layman.

Cro. Eliz. 599, 763. Bro. Diſm. pl. 1. pl. 5. 2 Rep. 44.

6. A Layman could at the Common Law have preſcribed, that in Conſideration of an annual Sum of Money to be paid to the Parſon, for all Tithes ariſing within a Manor, he was intitled to the Tenths of all Corn growing in the Manor.

1 Inſt. 159. 11 Rep. 13. Fin. Rep. 309.

7. At this Day a Layman is capable of receiving Tithe: For the Tithes belonging to many Churches, and ſome Portions of Tithes, which upon Diſſolution of Monaſteries were by divers Statutes veſted in the Crown, are become Lay-Fees, and have all the Properties of temporal Inheritance.

(F) To whom parochial Tithes are to be paid.

2 Inſt. 641, 653. Bro. Diſm. pl. 21. Hob. 296.

1. BEFORE the Decretal Epiſtle of Pope *Innocent* the Third, which was written about the Year 1200, and which, from its being dated at *Lateran*, has been often miſtaken for a Decree of the Councel of *Lateran* holden not many Years before, parochial Tithes were not appropriated to any Spiritual Perſon in particular: But it was in the Power of every Perſon, to pay Tithes to ſuch Spiritual Perſon or Corporation as he pleaſed.

2 Inſt. 641.

2. By that Epiſtle, which laments the Inconveniences ariſing from this Power, it was directed, that, for the Time to come, the Tithes of all Pariſhes ſhould be paid to the Perſons having the Cure of Souls in the reſpective Pariſhes, who were called Rectors.

Ibid.

3. That Epiſtle, which would not have been in itſelf obligatory, being founded in Reaſon and Juſtice was well received, and ſoon became Part of the Law of the Land; and in Conſequence thereof Rectors became intitled to all the Tithes, except Portions of Tithes, ariſing in their reſpective Pariſhes.

Spelm. Eng. Works 137.

4. As many Advowſons had, before that Decretal Epiſtle was written, been granted to divers religious Perſons, as to Abbots, Priors, ſingle Deans and ſingle Prebends, and their Succeſſors, the Practice of collating themſelves to the Churches thereto belonging, and of undertaking perſonally the Cure of Souls, was for the Sake of keeping the Tithes in their own Hands ſoon after introduced. As this Practice was followed by their Succeſſors, the Tithes of many Pariſhes were kept perpetually in their own Hands. In Proceſs of Time, in order to avoid a Multiplicity of Inſtitutions and Inductions, ſuch Perſons obtained Licences, that they and their Succeſſors might be perpetual Incumbents of the Churches.

5. In

5. In this Way Approbation to Churches did begin: But Churches were at that Time only appropriated to ſuch ſingle Spiritual Perſons, as did in Perſon adminiſter the Sacraments and perform other Divine Service. Spelm. Eng. Works 138.

6. Deans and Chapters did afterwards obtain Licences, for the Appropriation of Churches belonging to their Advowſons: But as they, being a Body Corporate, could not jointly do the Duty of a Pariſh Prieſt, and as no one in particular was bound to do it, a Deputy, called a Vicar, was appointed under their common Seal to do that Duty: But the Perſon ſo appointed was uſually a Member of the Spiritual Corporation, to which the Church was appropriated. Ibid.

7. The Practice of appointing Vicars being once introduced, Prioreſſes and Nuns obtained the like Licences for the Appropriation of the Churches belonging to their Advowſons; and they likewiſe appointed Vicars, and took the Profits of the Advowſons to themſelves. Ibid.

8. Encouraged by theſe Examples the Abbots, Priors, ſingle Deans and ſingle Prebends, who had before performed Divine Service in Perſon, did likewiſe appoint Vicars. Ibid.

9. It ſeems probable, that Vicars were not at firſt endowed with any Part of the Tithes belonging to their reſpective Churches, but received a certain yearly Sum of Money, by Way of a Salary; and it appears, that the Sum received by ſome Vicars was very ſmall.

10. For by the 15 *R.* 2. *c.* 6. after reciting, that divers Damages and Hindrances have happened, and daily do happen, to the Pariſhioners of divers Places by the Appropriation of the Benefices of ſuch Places, it is agreed and aſſented, "That in every Licence from henceforth to be made in "the Chancery, of the Appropriation of any Pariſh Church, it ſhall be ex- "preſsly contained and comprized, that the Dioceſan of the Place upon "the Appropriation of ſuch Churches ſhall ordain, according to the Value "of ſuch Churches, a convenient Sum of Money, to be paid and diſtributed "yearly, of the Fruits and Profits of the ſame Churches, by thoſe that ſhall "have the ſaid Churches in proper Uſe, and by their Succeſſors, to the "poor Pariſhioners of the ſaid Churches, in Aid of their Living and Sus- "tenance for ever; and alſo that the Vicar be well and ſufficiently en- "dowed."

11. Afterwards by the 4 *H.* 4. *c.* 12. it is ordained, "That from hence- "forth in every Church appropriated, or to be appropriated, a ſecular Per- "ſon be ordained perpetual Vicar, canonically inſtituted and inducted to "the ſame, and convenably endowed by the Diſcretion of the Ordinary, "to do Divine Service, to inform the People, and to keep Hoſpitality "there; and that no religious Perſon be in any wiſe made Vicar in "any Church appropriated, or to be appropriated, for the Time to "come."

12. As it is only provided by the 4 *H.* 4. *c.* 12. that Vicars ſhall be endowed at the Diſcretion of the Ordinary, it has of Courſe happened, that the Right of a Vicar to Tithes is very different in different Pariſhes.

13. In divers Pariſhes, the Vicars are only endowed with ſome particular Tithes ariſing in their reſpective Pariſhes. Cro. Eliz. 462. 2 Roll. Abr. 335. pl. 6.

14. In other Pariſhes, the Vicars are endowed with all Tithes ariſing in their reſpective Pariſhes, except ſuch as are reſerved in the Deeds of Endowment. 2 Roll. Abr. 335. pl. 1. pl. 4.

15. In other Pariſhes, the Vicars are endowed with all ſmall Tithes ariſing in their reſpective Pariſhes.

16. It follows, that as the Right of a Vicar to Tithes does always depend upon the Endowment of his Vicarage, he ought, whenever his Right is queſtioned, to ſhew himſelf entitled, by Endowment, to the Tithe he claims. Cro. Eliz. 633. 2 Bulſtr. 27. Bunb. 7, 72, 169.

17. But

2 Keb. 729. Bunb. 7, 169. 17. But although a Vicar cannot produce the Deed of Endowment, if he can ſhew, that he and his Predeceſſors have conſtantly received the Tithe by him claimed, this is Evidence, that he has a Right by Endowment to Tithe.

Hardr. 329. Twiſſe *v.* Blunt. 18. In many Deeds of Endowment of Vicarages a Power is reſerved to the Archbiſhop, to increaſe the Tithes of the reſpective Vicarages; and if ſuch Power be not reſerved, an Augmentation of the Tithes may be made with the Conſent of the Archbiſhop.

Ibid. 19. In Conſequence of this it has been holden, that if a Vicar and his Predeceſſors have for a long Time received a Tithe, which they were not intitled to under the Deed of Endowment, this, although the Deed of Augmentation be not produced, is Evidence, that the Vicarage has at ſome Time been augmented with the Tithe.

11 Rep. 13. Hob. 308. 20. Upon the Diſſolution of Monaſteries, the Tithes of all Churches appropriated to the Monaſteries, and all Portions of Tithes belonging to them, were by divers Statutes veſted in the Crown.

21. Much the greater Part of theſe Tithes have been ſince granted in Fee by the Crown.

22. All Tithes ſo granted, except ſuch as have been ſince given to the reſpective Churches, are at this Day due to the Grantees of the Crown, who are called Impropriators.

23. It is in the general true, that a Chaplain, or a Curate, is not intitled to Tithe.

Littl. Rep. 72. Anon. 24. A Suit being brought for Tithes by a Chaplain to a Chapel of Eaſe, which was neither Preſentative nor Donative, it was holden, that he was not intitled to any Tithe.

Noy 15. Bott *v.* Brabalon. Bunb. 273. Price *v.* Pratt. 25. It was inſiſted, that by the Cuſtom of the Pariſh the Curate after being appointed by the Rector, was intitled to divers Kinds of Tithes: But it was holden, that theſe could not be due to him; becauſe the Rector might remove him at Pleaſure.

26. A Bill being brought by a perpetual Curate for the Recovery of divers ſmall Tithes, it appeared, that the Chapel, of which he was Curate, was annexed to the Church of *Hemels Hempſtead*; that he was nominated thereto for Life, by the Vicar of *Hemels Hempſtead*, who in the Inſtrument of Nomination had given him the ſmall Tithes of the Chapelry, with a Power to ſue for the ſame in the Vicar's Name; and that he was licenced by the Biſhop. It was holden that the Plaintiff had no Right to the Tithes, becauſe he had not a permanent Intereſt in them; for that an Appointment to a Curacy, although expreſsly made for Life, is revocable by the Common Law without any Cauſe being ſhewn, and by the Eccleſiaſtical Law upon good Cauſe being ſhewn.

27. But a Curate, who comes in by Inſtitution from the Ordinary, may be intitled to Tithes.

2 Ch. Ca. 19, 31. Perne *v.* Oldfield. 28. An Impropriator gave the Tithes of a Pariſh, all which belonged to his Rectory, by Will to the Maintenance of the Miniſter of the Pariſh for ever: But did not give either the Tithes, or the Power of nominating the Miniſter, to any Perſon. This Deviſe being void in Law, becauſe it was to no certain Perſon, the Heir at Law nominated *A.* to be the Miniſter. Afterwards, upon the Suppoſition of a Lapſe to the Crown, *B.* was preſented, inſtituted and inducted. A Queſtion, to whom the Tithes of the Pariſh belonged, coming before a Court of Equity, it was decreed, that as *B.* came in by Inſtitution from the Ordinary, although he was not ſtrictly ſpeaking either Rector or Vicar, they were due to him.

Sheph. Abr. 1013. 29. Perſonal Tithes are to be paid in the Pariſh, wherein the Perſon who is to pay them lives.

30. If

30. If Cattle, for which an Agiſtment Tithe is due, have been ſometimes depaſtured in one Pariſh, and at other Times in another, Tithe muſt be paid in each Pariſh, in Proportion to the Time they were therein depaſtured. Bro. Diſm. pl. 16.

31. By the 2 *Ed.* 6. *c.* 13. *par.* 3. it is enacted, "That every Perſon, "which ſhall have any Beaſts, or other titheable Cattle, going, feeding or "depaſturing in any Waſte or Common, whereof the Pariſh is not certainly "known, ſhall pay Tithes for the Increaſe of the ſaid Cattle to the Parſon, "Vicar, Proprietor, Portionary, Owner or other their Farmers or Depu-"ties of the ſaid Pariſh, Hamlet, Town or other Place, where the Owner "of the ſaid Cattle dwelleth."

32. The Tithe of Lambs is to be paid in the Pariſh wherein the Sheep yean, although the Sheep have been fed in two or more Pariſhes. Bunb. 139. Boys v. Ellis, 12 Mod. 497.

33. No predial Tithe, which would, if the Corn or other Thing from which it ariſes had been ſevered before the Death of the Rector or Vicar of the Pariſh, have been due to the Rector or Vicar, is due to the Executor of the Rector or Vicar: But the Perſon, who ſucceeds to the Benefice, is intitled thereto. 1 Roll. Abr. 655. pl. 3. 2 Bulſtr. 184.

(G) Do whom extraparochial Tithes are to be paid.

1. ALL Tithes, ariſing in an extraparochial Place, are by the Canon Law to be paid to the Biſhop of the Dioceſe, in which the Place lies. 2 Inſt. 647.

2. But by the Common Law all ſuch Tithes are to be paid to the King. Bro. Diſm. pl. 10. 2 Inſt. 647. 2 Roll. Abr. 657. pl. 2. pl. 5.

3. As the Appropriation of Tithes, in Conſequence of the Decretal Epiſtle of *Pope Innocent* the Third, extended only to parochial Tithes, all the Tithes of extraparochial Places continued to be due to the King. Ante, p. 64. Cro. Eliz. 512.

4. And conſequently all extraparochial Tithes, of which no Grant has been made, are at this Day due to the King.

(H) Of the Right to a Portion of Tithes in a Pariſh.

1. BEFORE the Tithes of Pariſhes were, in Conſequence of the Decretal Epiſtle of Pope *Innocent* the Third, appropriated to the Perſons having Cure of Souls in the reſpective Pariſhes, it was a common Practice, to grant the Tithes of a whole Manor, or of a particular Farm, to any Spiritual Perſon, or to any Spiritual Corporation, and to his and their Succeſſors. Ante, p. 64. 2 Inſt. 641. Bunb. 190.

2. A Stop was, by the Appropriation of parochial Tithes, put to this Practice: But as the Right to Tithes, which had been before thus granted, continued in the Spiritual Perſon or Corporation, and in his and their Succeſſors. The Tithes thus granted, in order to diſtinguiſh them from the other Tithes of the Pariſh, have been always called Portions of Tithes.

3. Some Portions of Tithes do at this Day continue in the Hands of the Succeſſor to the Spiritual Perſon or Corporation, to whom they were at firſt granted.

4. Others, which came to the Crown upon the Diſſolution of Monaſteries, are at this Day in the Hands of the King, or the Grantees of the Crown.

2 Inſt. 641, 642, 652. 5. Hence it frequently happens, that a Spiritual Perſon has a Right to a Portion of Tithes, in a Pariſh of which he is neither Rector nor Vicar; and that an Impropriator has a Right to a Portion of Tithes, in a Pariſh of which he is not Impropriator.

(I) By whom Tithe is to be paid.

Hardr. 184. Pory *v.* Wright, Paſc. 13 Car. 2. 1. IT has been holden, that the Owner of the Cattle is liable to pay the Tithe due for depaſturing them.

Bunb. 3. Underwood *v.* Gibſon, Hill. 2 G. 1. 2. But in a modern Caſe in the Court of Exchequer it was holden, that only the Occupier of the Land is liable to pay Tithe for depaſturing Cattle; although the Cattle are the Property of a Stranger.

3. And in a Note at the Bottom of the latter Caſe it is ſaid to have been ſettled, in the Caſe of *Fiſher* and *Leman*, *M.* 7 *Geo.* 1. that in the general only the Occupier of the Land is liable to an Agiſtment Tithe: But that in the Caſe of a Common, the Owner of the Cattle is liable thereto; becauſe the Owner of the Soil has no Profit from depaſturing the Cattle.

Noy 150. Baker's Caſe, Trin. 44 Eliz. 4. It is laid down in one Caſe, that the Perſon, who buys Corn of the Grower, is not liable to pay the Tithe thereof; becauſe he may not be known to the Parſon.

Cro. Ja. 362. Moyle *v.* Ewer, Mich. 10 Ja. 1. 5. But it is in another Caſe laid down, that the Vendee of ſtanding Corn is liable to pay the Tithe thereof.

Brown. 34. Hele *v.* Fretenden. 2 Bulſtr. 184. 6. And the latter ſeems to be the better Opinion; for in two other Caſes it is laid down, that the Vendor, who after ſelling his Corn had ſevered it by Order of the Vendee, ſhould pay Tithe thereof; becauſe it was ſold in a ſecret Manner.

7. From whence it may be fairly inferred, that, if the Corn had been ſold in an open Manner, the Vendee would have been liable to pay Tithe thereof.

(K) What

(K) What Tithes are to be deemed ſmall Tithes.

1. AS the Vicars are in many Pariſhes endowed with all ſmall Tithes, Queſtions do frequently ariſe, whether the Tithes of certain Things are ſmall Tithes.

2. But ſuch Queſtions can only ariſe concerning Things of which a predial Tithe is due; for it is univerſally agreed, that every perſonal, and every mixed Tithe, is a ſmall Tithe.

3. It was the Opinion of *Holt* Chief Juſtice, that in order to diſtinguiſh, whether the Tithe of a particular Thing be a great or ſmall Tithe, Regard muſt be had to the Place where the Thing from which it ariſes, grows: For that if Corn grow in a Garden the Tithe thereof is a ſmall Tithe; and *vice verſa*, that if a Thing, the Tithe of which is in the general a ſmall Tithe, grow in a Field, the Tithe thereof is a great Tithe. 12 Mod. 41. Wharton v. Liſle. 3 Lev. 365. Skin. 341.

4. But it was holden by the Opinion of the other Juſtices, *Eyre*, *Dolben* and *Gregory*, that the Nature of the Thing, from which the Tithe ariſes, is only to be conſidered; and that the Tithe of Corn although grown in a Garden, would, agreeably to what is laid down in *Moor* 909. be a great Tithe.

5. It was however ſaid in this Caſe by *Dolben* and *Gregory*, that if a Thing, the Tithe of which is in the general a ſmall Tithe, ſhall be grown in the greater Part of the Pariſh, the Tithe thereof would, agreeably to what is laid down in *Hutt.* 78. be a great Tithe.

6. But *Eyre* was of a different Opinion as to this Point.

7. The Opinion of *Holt* Chief Juſtice was contrary to what is laid down in divers Books; and the Opinion of the three Juſtices has been adhered to in two modern Caſes.

8. It is in divers Books laid down, that the Tithe of Saffron is a ſmall one; although a Field of forty Acres be planted therewith. Cro. Eliz. 467. Beddingfield v Feak. Hut. 78. Moor 909.

9. In one of the modern Caſes the Queſtion was, whether the Tithe of Potatoes, planted in Fields in a Pariſh to the Amount of three hundred Acres, is a ſmall Tithe? It was holden to be ſo. And by Lord *Hardwicke* Chancellor—It ſeems to me, that in the Caſe of *Wharton* and *Liſle*, *Holt* Chief Juſtice did untimely acquieſce in the Opinion of the other three Judges; for if he had not, the Judgment would ſcarce, as was done, have been given in his Abſence, and upon the firſt Argument. The Diſtinction betwixt a great and ſmall Tithe was at firſt founded upon the Quantity of the Thing from which it aroſe. Thus the Tithes of Corn, and ſome other Things, were called great Tithes: Becauſe theſe Things uſually grew in large Quantities. On the other Hand, the Tithes of Flax, and ſome other Things, which generally grew in ſmall Quantities, were called ſmall Tithes. Whenever the Cultivation of a new Thing has been introduced, the Method has been to denominate the Tithe thereof great or ſmall from its Similitude to other Things, the Tithes of which are great or ſmall: But it would be productive of great Uncertainty to hold, that a Tithe, which has once obtained the Denomination of great or ſmall, ſhould be liable to a new Denomination, from the Quantity of the Thing from which it ariſes, or from the Place where it grows. It has been ſaid, that if neither the Quantity of the Thing, nor the Place in which it grows, ought to be regarded, the Value of great Tithes may, by growing only thoſe Things in a Pariſh which are liable to the Payment of ſmall MS. Rep. Smith v. Wyatt, Trin. 16 Geo. 2. 2 Atk. 365. S. C.

Tithes, be reduced to almoſt nothing. This is very true, and it is an Inconvenience: But it is one, which muſt be ſubmitted to by all who have Eſtates in Tithes; becauſe it ariſes from the tranſitory and fluctuating Nature of ſuch Eſtates.

MS. Rep. Sims v. Barnett, Mich. 1 G. 3. 10. In the other modern Caſe it was laid down by Lord *Henley* Keeper, that the Difference betwixt a great and ſmall Tithe depends entirely upon the Nature of the Thing from which it ariſes.

Skin. 341. 11. It is ſaid to have been ruled at an Aſſize, that the Tithe of Clover Seed is a great Tithe; becauſe Clover Seed is a Species of Grain.

Bunb. 344. 12. But it has been decreed by the Court of Exchequer, that the Tithe of Clover Seed is a ſmall Tithe.

1 Roll. Abr. 643. pl. 11. 12 Mod. 41. 3 Lev. 365. 13. It has been holden, that the Tithe of Flax is a ſmall Tithe.

Skin. 341. 3 Keb. 419. Bunb. 79, 344. 14. The Tithe of Hay is not a ſmall Tithe, but Vicars are in many Pariſhes intitled thereto by Endowment.

Hutt. 78. Skin. 341. 3 Keb. 419. Bunb. 79, 344. 15. And if a Vicar be intitled by Endowment to the Tithe of Hay made of Graſs, he is likewiſe intitled to the Tithe of Hay made of Clover, Sainfoin, or any other Thing of the like Kind, although the Cultivation of the Thing has been introduced ſince the Endowment of his Vicarage: Becauſe every one of theſe Things is a Species of Graſs.

Sid. 443. Crouch v. Riſden. 16. The Tithe of Hops has been holden to be a ſmall Tithe.

Bunb. 79. 17. The Tithes of Peas and Beans are in the general great Tithes: And if a Vicar be intitled to the Tithe of either of theſe, it is by Endowment.

Bunb. 170. Gumley v. Birt. 18. A Bill being brought for the Tithes of Peas and Beans, ſowed and ſet in Rows, drilled, hoed and hand-weeded in a Garden-like Manner, as being ſmall Tithes; the Defendant inſiſted, that Peas and Beans, cultivated in this Manner, had uſually been grown in a great Part of the Pariſh; and that Tithes thereof had never been paid to the Vicar. It was decreed, without going into the Conſideration of the Quantity grown in the Pariſh, that as no Endowment of theſe Tithes was produced, nor any Receipt of them by the Vicars proved, the Bill ſhould be diſmiſſed.

MS. Rep. Sims v. Barnet. Mich. 1 G. 3. 19. In a very late Caſe a Bill was brought for the Tithes of Peas and Beans, grown in Fields; gathered by Hand while green; and ſold in Markets. It was ſaid for the Plaintiff, that, although the Tithes of the Peas and Beans would, if they had ſtood till they were ripe, have been great Tithes, by gathering the Peas and Beans before they were ripe, and by Hand, they became ſmall Tithes. The Decree was, that the Tithe was a great Tithe. And by Lord *Henley* Keeper—The Difference betwixt a great and ſmall Tithe depends entirely upon the Nature of the Thing from which it ariſes. It would be ſtrange to hold, that the gathering of a Thing at one Time ſhould make the Tithe thereof a ſmall Tithe, which would, if the Thing had been gathered at another Time, have been a great Tithe; it has been expreſsly determined, in the Caſe of *Hodgſon* v. *Smith*, *Bunb.* 279. that the Tithe of Tares, whether cut green or ripe, is a great Tithe. It was holden, in the Caſe *Gumley* v. *Birt*, *Bunb.* 170. that the Mode of Cultivating Land for the growing of Peas or Beans did not make the Tithe thereof a ſmall Tithe; and there is ſurely leſs Reaſon to hold, that the Mode of gathering Peas or Beans ſhould make the Tithe thereof a ſmall Tithe.

20. If a Vicar be entitled by Endowment to the Tithe of Peas and Beans, he is intitled to ſuch Tithe, in what Way ſoever the Land upon which they grow is cultivated.

21. A Bill being brought for the Tithes of Peas and Beans, the Defendant inſiſted, that the Vicar was only intitled to the Tithes of Peas and Beans grown in Fields, when the Ground had been turned with a Spade: But it was decreed by the Court of Exchequer, that he was alſo intitled to the Tithes of Peas and Beans grown in Fields, when the Ground has been turned with a Plough; and the Decree was affirmed in the Houſe of Lords. Bunb. 19. Nicholas *v.* Elliot.

22. It has been decreed, that the Tithe of Potatoes is a ſmall Tithe. MS. Rep. Smith *v.* Wyat, Trin. 16 Geo. 2. 2 Atk. 365. S. C.

23. The Tithe of Saffron has been holden to be a ſmall Tithe. Cro. Eliz. 467. Bedingfield *v.* Feak, Hut. 78.

24. It has been holden, that the Tithe of Wood is a ſmall Tithe. Cro. Car. 28. Udall *v.* Tindall, Sid. 447.

25. The Tithe of Wood is in the General a great Tithe: But in ſome Pariſhes it is a ſmall Tithe. 1 Roll. Abr. 643. U. pl. 2.

(L) How far the Cuſtom of a Pariſh is to be regarded in the ſetting out of Tithes.

1. IT is by divers Statutes provided, that Tithes ſhall be paid according to the Uſages and Cuſtoms of the reſpective Pariſhes, in which they ariſe.

2. By the 27 *H.* 8. *c.* 20. *par.* 1. it is enacted, "That every Perſon, "according to the laudable Uſages and Cuſtoms of the Pariſh, or other "Place where he dwelleth, ſhall yield and pay his Tithes and other "Duties of Holy Church."

3. By the 32 *H.* 8. *c.* 7. *par.* 2. it is enacted, "That all Perſons ſhall "fully, truly and effectually, divide, ſet out, yield or pay, all Tithes, "according to the lawful Cuſtoms and Uſages of the Pariſhes or Places, "where ſuch Tithes or Duties ſhall grow, ariſe, come or be due."

4. By the 2 & 3 *Ed.* 6. *c.* 13. *par.* 1. after enacting, That the Statutes made in the Twenty-ſeventh and Thirty-ſecond Years of the Reign of the late King *Henry* the Eighth, concerning the true Payment of Tithes and other Duties, ſhall abide in their full Strength and Virtue, it is further enacted, "That all Perſons ſhall truly and juſtly, without Fraud or Guile, "yield and pay all Manner of predial Tithes, in their proper Kind, as "they riſe and happen, in ſuch Manner and Form, as hath been of Right "yielded and payed within forty Years next before the making of this Act, "or of Right or Cuſtom ought to have been paid."

5. And by *par.* 8. it is enacted, "That in every Place the ſame Cuſtom "of Payment of perſonal Tithes, which had been obſerved within forty "Years before the making of this Act, ſhall be obſerved and continue."

6. The Limitation in this Statute, to forty Years before the making thereof, agrees with the Eccleſiaſtical Law: By which if any Tithe had been Cro. Ja. 454. Dobitoſhe *v.* Curteen.

been paid in a certain Way for the Space of forty Years, such Payment would have made a good Custom against the Church.

7. The Construction of these Statutes has constantly been; that a Custom of a Parish as to the Payment of Tithes is not to be regarded, unless it be a reasonable one.

1 Sid. 278. 1 Lev. 179. Ld. Raym. 359. 12 Mod. 306.

8. Wherever the Tithe of a Thing is due of common Right, as of Wheat, a Custom of a Parish to pay less than the tenth Part for Tithe, is bad; because this Custom, which amounts to a Prescription in *non Decimando* as to Part of the Thing, is unreasonable.

Noy 108. Holland v. Heale, 1 Sid. 278. 1 Lev. 179.

9. But where the Tithe of a Thing is due by Custom, as of Fish taken in the Sea, a Custom of a Parish to pay less than the tenth Part is good; and indeed there seems to be no Way, except by the Custom, of ascertaining what is to be paid for a Tithe, which is only due by Custom.

Hob. 107. Wilson v. The Bishop of Carlisle, Bunb. 321.

10. It was alledged, that by a Custom of a Parish, the tenth Part was without Fraud to be delivered to the Rector, in full Satisfaction for the Tithe of Wool; and that this was to be delivered *absque visu et tactu novem partium ejusdem Lanæ per Rectorem.* The Custom was holden to be unreasonable: For although it be alledged, that the tenth Part of the Wool was to be delivered without Fraud; yet this is to be delivered in such Manner, as is extremely liable to Fraud. It is moreover contrary to Reason, that the Person who is to pay Tithe should be the sole Judge, whether it be justly paid.

1 And. 199. Adam's Case.

11. The Custom was, that the tenth Sheaf, of such Corn as was bound up in Sheaves, was to be paid in full Satisfaction for the Tithe of all Corn grown upon certain Lands. This was adjudged a bad Custom: Because it admits of the paying as little for Tithe of Corn as the Occupier pleases; for he may choose how much of the Corn he will bind up in Sheaves.

Godb. 234. Jacks v. Cavendish.

12. In a Suit for subtracting Tithe, the Defendant alledged, that by the Custom of a Farm, the Occupier of the Farm, after having set out the Tithe of Corn, was to take back thirty Sheaves of the Tithe. As it was not averred, that the Farm was a large one, this Custom was holden to be bad: For if it were a small Farm, there might be no more than thirty Sheaves set out for Tithe, in which Case the Parson would have no Tithe.

1 Leon. 99. Stebbs v. Goodlake. Moor 913.

13. It was alledged, that by the Custom of a Parish, when certain Lands are sown with Corn, the Parson is to have for Tithe the Corn grown upon every tenth Land, beginning to reckon from the Land next the Church. It was holden that this Custom, which puts it into the Power of the Occupier, by neglecting to manure and sow the tenth Lands properly, to make the Tithes thereof worth very little, is unreasonable, and therefore bad.

March 79. Weeden v. Harding.

14. The Custom of a Parish was to pay Tithe in Kind of Sheep, if they were kept a whole Year in the Parish: But if they were sold before shearing Time, only a Halfpenny was to be paid for the Tithe of each Sheep. This was adjudged an unreasonable Custom; for thereby the Tithe of Sheep may, at the Owner's Pleasure, be made worth very little.

12 Mod. 498. Selby v. Bank.

15. It was alledged, that by the Custom of a Parish the tenth Lamb was to be paid, for the Tithe of all Lambs yeaned in the Parish; and that in Consideration of this, no Tithe was to be paid for Ewes depastured in the Parish, which did not yean therein. This was holden to be a bad Custom; for, by taking the Ewes out of the Parish a little before the Time of yeaning, the Parson may be deprived of his Tithe of Sheep.

Bunb. 133. Reignolds v. Vincent.

16. A Custom to pay Tithes of Lambs upon *Saint Mark's* Day was holden to be unreasonable: Because at that Time Lambs are in the general so young, that they are not able to live without their Dams.

(M) Of

(M) Of the Time and Manner of paying perſonal Tithes, where there is no Cuſtom in a Pariſh.

1. BY the 2 & 3 *Ed.* 6. *c.* 13. *par.* 7. it is enacted, "That every Perſon, liable to the Payment thereof, ſhall yearly at or before *Eaſter* "pay for his perſonal Tithe, the tenth Part of his clear Gain, his Charges "and Expences according to his Eſtate, Condition or Degree, to be there-"in abated, allowed and deducted."

2. It was determined in the Houſe of Lords, upon an Appeal from the Court of Exchequer, that the Occupier of a Corn Mill is only liable to pay, for his perſonal Tithe, the tenth Part of his clear Profit, after the Charge of erecting the Mill, and the Expences of Horſes, Servants and all other Things are deducted. 1 Eq. Ca. Abr. 366. Newſ *v.* Chamberlain.

3. It is ſaid to have been the Opinion of *Gilbert* Chief Baron, that *Eaſter* Offerings were at firſt a Compenſation for perſonal Tithes. Bunb. 174.

4. And this Opinion ſeems to be confirmed, by two late Caſes in the Court of Exchequer; in which the Court unanimouſly agreed, that *Eaſter* Offerings are due of common Right. Bunb. 173, 198.

5. For it cannot reaſonably be ſuppoſed, that an *Eaſter* Offering is due of common Right, unleſs it be at the ſame Time ſuppoſed, that it was at firſt paid in Lieu of ſome Thing due of common Right; and it ſeems more probable, that it was at firſt paid in Lieu of the Tithe of perſonal Labour, than of any other Thing.

(N) Of the Time and Manner of ſetting out predial Tithes, where there is no Cuſtom in a Pariſh.

1. IT is laid down in divers Books, that only one predial Tithe can be due in the ſame Year from the ſame Land. Fitz. N. B. Bro. Diſm. pl. 16. 2 Inſt. 652. 11 Rep. 16.

2. But it ſeems to be now ſettled, that more than one predial Tithe may be due from the ſame Land in the ſame Year.

3. It was holden many Years ago, that Tithe is due of aftermowth Hay. 1 Roll. Abr. 640. pl. 11. Paſch. 41 Eliz.

4. It was holden by the Court of Exchequer in a modern Caſe, that Garden Grounds ſhall pay Tithes of the different Crops produced in the ſame Year; and that Tithe is due of Turnips when pulled, although they grow upon Land which has in the ſame Year paid Tithe. Bunb 10. Benſon *v.* Watkins. Hil 3 G. 1.

5. And in a ſtill later Caſe it was holden, by the ſame Court, that if Land be ſown with Turnips in the ſame Year that Tithe of Corn grown thereon has been paid, and be fed with Sheep or any unprofitable Cattle, Tithe is to be paid of the Turnips. Bunb. 314. Swinſen *v.* Digby. Hil. 5 G. 2.

6. It

Cro. Ja. 42. Hall v. Fettyplace. 6. It was indeed in one Caſe holden, that no Tithe is due of aftermowth Hay: But the Reaſon given in this Caſe, for ſuch Hay being exempted from the Payment of Tithe, is, that, by the Cuſtom of the Pariſh, the Occupier was to beſtow ſome extraordinary Labour about the Tithe of the firſt Crop of Hay.

Freem. 335. Anon. 7. It is laid down in one Caſe, that a predial Tithe is to be ſet out, as ſoon after the Corn or other Thing of which it ariſes is ſevered, as this can well be done, if there be no Cuſtom to the contrary.

Hetl. 100. Anon. 8. And it is in another Caſe ſaid, that if a Man, either negligently or with Deſign, ſuffer Apples to hang longer upon the Trees than they ought to hang, and they are ſtolen, he ſhall account for the Tithe thereof.

MS. Rep. Mather v. Holmwood, Mich. 5G. 3. 9. In a modern Caſe in the Court of Exchequer, it was ſaid by the Court, that all the Wheat growing in a Field muſt be cut down, before the Tithe of any Part of the Wheat can be ſet out.

MS. Rep. Ereſkine v. Ruſſle. Mich. 9G. 3. 10. In a ſubſequent Caſe in the ſame Court, wherein a Queſtion was, whether all the Wheat growing in a Field muſt be cut down, before the Tithe of any Part of the Wheat can be ſet out? the Caſe of *Mather* v. *Holmwood* was cited, and relied upon by the Councel for the Plaintiff, as a Determination in Point. The late Mr. *Huſſey*, after opening for the Defendant, obſerved, that the Queſtion was not, according to his Recollection, much argued in the Caſe of *Mather* v. *Holmwood*; for that, ſome Circumſtances of Fraud appearing in that Caſe, he, who was of Counſel with the Defendant, recommended it to his Client to ſubmit to a Decree, for accounting for the Tithe in Queſtion without Coſts. Having obſerved this, he, with that Delicacy and Candour for which he was moſt remarkably diſtinguiſhed, begged to be informed by the Court, whether he was precluded, by any Thing which fell from the Court in the Caſe of *Mather* v. *Holmwood*, from arguing the Queſtion in the preſent Caſe. Hereupon *Parker* Chief Baron ſaid, that it was the Deſire of the Court, to have the Queſtion, it being a Queſtion of the utmoſt Importance, fully argued; and, which ſhewed true Greatneſs of Mind as well as Goodneſs of Heart, he added, that, for his own Part, he ſhould be glad to reconſider the Queſtion, in Order to have an Opportunity, in Caſe he ſhould ſee Reaſon for it, of departing from an Opinion he had for ſome Time entertained. After hearing the Queſtion fully argued, and taking Time to conſider, the Opinion of the Court was, that it is not neceſſary to cut down all the Wheat growing in a Field, before the Tithe of any Part of the Wheat is ſet out; and that the Tithe may be ſet out, as often as a reaſonable Quantity of the Corn growing in a Field is cut down. Another Queſtion in this Caſe was, whether all the Barley or Oats growing in a Field muſt be cut down, before the Tithe of any Part of the Barley or Oats can be ſet out? The Opinion of the Court was—That it is not neceſſary to cut down all the Barley or Oats growing in a Field, before the Tithe of any Part can be ſet out; and that the Tithe may be ſet out as often as a reaſonable Quantity of the Corn growing in a Field is cut down. The Court did not aſcertain what is a reaſonable Quantity of Corn to be cut down, before any Tithe is ſet out. So far from doing this, it was ſaid, that it could not be done; inaſmuch as it muſt always depend upon the Circumſtances of the particular Caſe, whether the Tithe was ſet out before a reaſonable Quantity of Corn was cut down.

11. By the 2 & 3 *Ed.* 6. *c.* 13. *par.* 2. it is enacted, "That at all Times "and as often as predial Tithes ſhall be due, and at the Tithing Time of "the ſame, it be lawful to every Party, to whom any of the ſaid Tithes "ought to be paid, or his Deputy or Servant, to view and ſee their "ſaid Tithes to be juſtly and truly ſet forth and ſevered from the nine "Parts"

12. But it is not neceſſary, for the Occupier of Land to give Notice to the Perſon intitled to a predial Tithe, or to give Notice in the Church, at what Time he intends to ſet the ſame out. 1 Rol. Abr. 643. X. pl. 1. 2 Ventr. 48.

13. And in a modern Caſe *Carter* and *Comyns* Barons were of Opinion, that even a Cuſtom of a Pariſh, to give Notice at what Time a predial Tithe is to be ſet out, would be unreaſonable: For the Perſon intitled to the Tithe may live at the Diſtance of a hundred Miles from the Pariſh. Bunb. 333. Beaver v. Spratley, Hil. 7 Geo. 1.

14. But *Reynolds* Chief Baron was of Opinion, that ſuch a Cuſtom would be good; becauſe Notice to a Servant would in that Caſe be ſufficient.

15. The general Rule, as to the Manner of paying a predial Tithe, is, that the tenth Part of the Thing, from which it ariſes, is to be juſtly and truly ſet out upon the Land upon which it ariſes.

16. In ſome Caſes the Manner of ſetting out a predial Tithe, is aſcertained by judicial Determination.

17. It has been holden, that every tenth Sheaf of Corn is to be ſet out for the Tithe thereof. 1 Sid. 283. Ledgar v. Langley.

18. And it is ſaid, that the Sheaves, ſet out for Tithe of Corn, ought to be marked with a green Bough. Bunb. 186. Boughton v. Wright.

19. The Occupier of Land is not of common Right obliged, to gather the Sheaves of Corn, which have been ſet out for Tithe, into Shocks. 1 Sid. 283. Ledgar v. Langley.

20. But he may by Cuſtom be obliged to do this, and the Perſon, having a Right to the Tithe, may at any Time bring a Bill in a Court of Equity, for the Eſtabliſhment of the Cuſtom. 2 Atk. 136. Archbiſhop of York v. Sir Miles Stapleton.

21. Before the nine Sheaves of the Occupier of the Land are put into a Carriage, to be carried away, the whole ten are to be ſet out upon the Ground, that the Perſon, entitled to the Tithe thereof, may have an Opportunity of judging, whether the ſame be fairly ſet out. Bunb. 186. Boughton v. Wright.

22. In a very late Caſe in the Court of Exchequer, the Opinion of the Court, upon great Conſideration, was, that, unleſs there be a Cuſtom of the Pariſh to ſet the Tithe of Barley out in ſome other Manner, the Barley muſt be gathered into Cocks, and every tenth Cock muſt be ſet out for Tithe. MS. Rep. Ereſkine v. Ruffle, Mich. 9 G. 3.

23. In one Book it is laid down, that Tithe for depaſturing Cattle is to be paid for, at the Rate of two Shillings in the Pound of the Money received for the depaſturing. Freem. 329. Anon.

24. But it ſeems to be the better Opinion, that Tithe for depaſturing Cattle is to be paid for, at the Rate of two Shillings in the Pound of the annual Value of the Land, whereon the Cattle were depaſtured. Hardr. 183.

25. It is in one Caſe laid down, that the Tithe of Graſs mowed is to be ſet out before it is made into Graſs-Cocks. Hob. 250. Hide v. Ellis, Hil. 16 Ja. 1.

26. But it was in a modern Caſe holden, that the Tithe of Graſs mowed is not to be ſet out until it is made into Graſs-Cocks. 2 Will. 523.

27. The Perſon, intitled to the Tithe of Graſs mowed, is to be allowed a convenient Time, for making it into Hay upon the Land on which it grew. Bro. Diſm. pl. 12. 1 Rol Abr. 643. X. pl. 2. Str. 245.

28. It was formerly doubted, whether the Tithe of Hops were to be ſet out, by the tenth Hill as ſoon as the Binds were ſevered from the Ground, or by the tenth Meaſure, after the Hops were picked. Sid. 283. Ledgar v. Langley, Paſch.

But 18 Car. 2.

Bunb 20. Chilly v. Reeves, Trin. 2 Ja. 2. 29. But it has been determined in two Caſes, that the Tithe of Hops is to be ſet out by the tenth Meaſure, after they are picked.

Blis v. Chandler, Mich. 7 Geo. 1.

MS. Rep. Tyers v. Walton, in Dom. Proc. 15 May 1753. 30. The ſame was determined in a modern Caſe by the Court of Exchequer; and the Decree of this Court was affirmed upon an Appeal to the Houſe of Lords.

31. In ſome Caſes the Manner of paying a predial Tithe is aſcertained by Acts of Parliament.

32. By the 11 & 12 *W.* 3. *c.* 16. it is for the better aſcertaining the Tithes of Hemp and Flax enacted, "That every Perſon, who ſhall thereafter ſow any Hemp or Flax, in any Pariſh or Place within *England*, *Wales*, or *Berwick upon Tweed*, ſhall pay to the Parſon, Vicar or Impropriator, of ſuch Pariſh or Place, yearly, the Sum of five Shillings and no more, for each Acre of Hemp or Flax, before the ſame is carried off the Ground, and ſo in Proportion for more or leſs Ground ſo ſown."

33. By the 31 *G.* 2. *c.* 12. it is for the Encouragement of the Growth of Madder enacted, "That every Perſon, who ſhall thereafter plant or cultivate any Madder, in any Pariſh or Place within that Part of *Great Britain* called *England*, ſhall pay to the Parſon, Vicar, Curate or Impropriator, of ſuch Pariſh or Place, yearly, the Sum of five Shillings and no more, for each Acre thereof, and ſo in Proportion for more or leſs Ground ſo planted or cultivated, in Lieu of all Manner of Tithe of the ſaid Madder."

34. But it is in both theſe Statutes provided, that nothing therein contained ſhall extend, to charge any Land, which is diſcharged of Tithes by a *Modus*, an antient Compoſition, or otherwiſe.

Lat. 24. Stilman v. Cromer. 35. Although two Perſons are entitled to Moieties of a predial Tithe, the Occupier of the Land is not bound to ſet it out in Moieties: for it is the Duty of the Perſons, to whom the Tithe is due, to divide it after it is ſet out.

(O) Of the Time and Manner of ſetting out or paying mixed Tithes, where there is no Cuſtom in a Pariſh.

Freem. 335. Anon. 1. IT is in the general true, that mixed Tithes, which ariſe from Things inanimate, are to be ſet out or paid, as ſoon as they can conveniently be ſevered from the nine Parts.

2. The general Rule as to the Manner of ſetting out a mixed Tithe, ariſing from an inanimate Thing, is, that the tenth Part of the Thing is to be ſet out at the Place where it ariſes.

3. But the Manner of ſetting out mixed Tithes has, in ſome Caſes, been aſcertained by judicial Determinations.

Raym. 277. Dod v. Ingleton. 4. The tenth Meal of Milk of all a Farmer's Cows is to be ſet out for the Tithe of Milk; for if the Perſon, entitled to Tithe of Milk, ſhould be obliged to ſend for the tenth Part of every Meal, it would very often be not worth the ſending for.

5. It

5. It has been decreed, that the Tithe of Milk is to be carried by the Parishioner to the Parsonage-House. Raym. 277. Dod *v.* Engleton.

6. But *Holt* Chief Justice was of Opinion, that the Parishioner is only obliged to set out the Tithe of Milk; and he said, that the Decree in *Dod* and *Engleton* was rather an equitable one, and founded upon the Custom of the neighbouring Parishes. Ld. Raym. 359. Hill. *v.* Vaun.

7. And in a modern Case, the whole Court of Exchequer were of Opinion, that the Parishioner is only obliged to set out every tenth Meal of Milk at the usual Place of milking; that the Person intitled thereto ought to fetch it away in his own Pail or Vessel; and that, if he do not fetch it away before the next milking Time, the Parishioner may pour it on the Ground; becauſe he may then have Occasion for the Pail or Vessel in which it was set out. Bunb. 73. Dodson *v.* Oliver, Pasch. 8 Geo. 1.

8. The tenth Part, by Weight, is to be delivered for the Tithe of Wool. 12 Mod. 498.

9. Such mixed Tithes, as arise from the Young of Beasts, Birds or Fowls, are in the general to be set out or paid, as soon as the young Beasts, Birds or Fowls, can well live without the old ones. Bunb. 133. Reignolds *v.* Vincent.

10. It has been holden, that Tithe is not to be paid, for any Number of young Beasts, Bird or Fowls, under ten: But that this Number is to be carried over to the Account of the next Year. 12 Mod. 497. Selby *v.* Bark, Pasch. 13 W. 3.

11. But in a modern Case, it was decreed by the Court of Exchequer, that if the Number of young Beasts, Birds or Fowls, be under ten, this Number is not to be carried over to the next Year's Account, but the tenth Part of the Value thereof in Money is to be paid for Tithe. Bunb. 198. Egerton *v.* Still, Trin. 12 Geo. 1.

(P) Of the Time and Manner of paying Tithes due by Custom.

1. IT is in the general true, that where a Tithe is due by Custom, the Time and Manner of paying it are ascertained by the Custom; and indeed there seems to be no other Way, than by the Custom, to ascertain the Time and Manner of paying a Tithe, which is only due by Custom.

2. But the Time and Manner of paying Tithes of Houses in *London* are ascertained by Statutes.

3. By the 37 *H.* 8. *c.* 12. *par.* 2. it is enacted, "That the Inhabitants "of the City of *London* shall yearly, without Fraud or Covin, pay their "Tithes to the Parsons, Vicars and Curates of the said City, after the "Rate following, that is to wit of every ten Shillings Rent by the Year of "every House within the said City Sixteen-pence Halfpenny, and of every "Rent of twenty Shillings of every such House two Shillings and Nine-"pence."

4. And by *par.* 11. it is enacted, "That the said Inhabitants shall pay "their Tithes quarterly, by even Portions."

5. But by *par.* 18. it is enacted, "That where a less Sum, than is by "this Act directed to be paid for Tithe, hath been accustomed to be paid "for the Tithe of any House, that then the Inhabitant of such House "shall pay Tithe, only after such Rate as hath been accustomed."

6. By

6. By the 22 & 23 *Car.* 2. *ſtat.* 2. *c.* 15. *par.* 1 & 2. after reciting, that Tithes in the City of *London* were paid with great Inequality, and are ſince the late dreadful Fire, in rebuilding the ſame, by taking away of ſome Houſes, altering the Foundations of the others, and the new erecting of others, ſo diſordered, that in Caſe they ſhould not, for the Time to come, be reduced to a Certainty, many Controverſies and Suits of Law might thence ariſe, it is enacted, "That an annual certain Sum of Money there-"in mentioned, ſhall in Lieu of Tithes be paid, in all the Pariſhes within "the ſaid City, whoſe Churches have been demoliſhed or in Part con-"ſumed by the late Fire."

7. And by *par.* 3. it is enacted, "That the reſpective Sums of Money, "to be paid in the ſaid reſpective Pariſhes, and aſſeſſed as therein is direct-"ed, ſhall be deemed and taken to be the reſpective certain annual Main-"tenance (over and above Glebes and Perquiſites, Gifts and Bequeſts, to "the reſpective Parſon, Vicar or Curate of any Pariſh, or to the Succeſſors,) "of the reſpective Parſons, Vicars or Curates, who ſhall be legally inſti-"tuted, inducted and admitted into the ſaid reſpective Pariſhes."

8. By *par.* 10. it is enacted, "That the Impropriator or Impropriators "of any of the ſaid Pariſhes ſhall pay, and allow, what really and *bona* "*Fide* they have uſed and ought to pay and ſatisfy, to the reſpective "Incumbents of ſuch Pariſhes at any Time before the ſaid Fire, and the "ſame ſhall be eſteemed and computed, as Part of the Maintenance of "ſuch Incumbent."

(Q) In what Caſes the Payment of Tithes may be ſuſpended.

1. Of the Produce of Lands in the King's Hands.

Cro. Eliz. 511. Wright v. Wright.

1. IT is laid down in one Caſe, that the King is exempted by Virtue of his Prerogative, from the Payment of Tithes.

Hardr. 315. Compoſt's Caſe.

2. But in another Caſe it was holden, that even the demeſne Lands of the Crown are not exempted, by Virtue of the Prerogative, from the Payment of Tithes.

1 Jon. 387. Earl of Hertford v. Leech.

3. Tithes are not due of the Produce of Lands in the King's Hands; becauſe the Appropriation of parochial Tithes does not extend to ſuch Lands.

1 Jon. 387. Earl of Hertford v. Leech. Cro. Eliz. 511.

4. The Priviledge, however, of being exempted from the Payment of Tithes is perſonal to the King; and does not extend either to his Grantee or Leſſee.

2. Of the Produce of Lands, which have been barren.

5. By the 2 & 3 *Ed.* 6. *c.* 13. *par.* 5. it is enacted, "That all barren "Heath or waſte Grounds, other than ſuch as be diſcharged of the Pay-"ment of Tithes by Act of Parliament, which before this Time have "paid no Tithes by Reaſon of their Barrenneſs, and now be, or hereafter "ſhall

" ſhall be, improved and converted into arable Ground or Meadow, ſhall " from henceforth, after the End of ſeven Years next after ſuch Im- " provement, pay Tithes of the Corn and Hay growing upon the " ſame."

6. There is not in this Statute an expreſs Suſpenſion of the Payment of Tithes, for the Lands therein mentioned: But there is certainly an implied Suſpenſion, for the Space of ſeven Years next after the Improvement of the Lands. 2 Inſt. 656.

7. It has been conſtantly holden, that only ſuch Land is barren, within the Meaning of this Statute, as produces nothing profitable by Reaſon of its natural Barrenneſs. 2 Inſt. 656. Freem. 335. 6 Mod. 96. Ld. Raym. 991. 3 Bulſtr. 165.

8. If Land, which has from Time immemorial been full of Buſhes, be grubbed, and converted into arable Ground or Meadow, Tithes of the Corn and Hay thereupon grown are immediately due; becauſe the Land was not naturally barren, but became ſo by Negligence. Cro. Eliz. 475. Sherington v. Fleetwood.

9. If Wood Land be grubbed, and converted into arable Ground or Meadow, Tithes of the Hay and Corn thereupon grown become due immediately. Bunb. 159. Beardmore v. Gilbert. 3 Bulſt. 165.

10. Tithes are due immediately, of the Corn and Hay grown upon Broom-Land, which has been grubbed and converted into arable Ground or Meadow. Roll. Rep. 39. Maſcal v. Price.

11. If Land, which has from Time immemorial being overflown by the Sea, be drained, the Payment of Tithes of the Corn and Hay grown upon this Land is not ſuſpended: Becauſe the Land was not in its Nature barren, but became ſo by Accident. 3 Bulſt. 165. Wit v. Buck. Cro. Eliz. 475.

12. This Statute does not ſuſpend the Payment of any Tithes, which were paid before the Improvement of the Land.

13. For by *par.* 6. it is enacted, That if any barren Heath or waſte " Ground hath before this Time paid any Tithes, and the ſame be here- " after improved and converted into arable Ground or Meadow, the Owner " thereof ſhall, during the ſeven Years next after the ſame Improvement, " pay ſuch Kind of Tithes, as were paid for the ſame before the ſaid " Improvement."

3. Of the Produce of Glebe Lands.

14. So long as the Rector of a Pariſh holds his Glebe in his own Hands, the Payment of ſmall Tithes ariſing thereupon is ſuſpended; notwithſtanding the Vicar of the Pariſh is endowed of all ſmall Tithes ariſing in the Pariſh: For the Maxim is, *Eccleſia Decimas ſolvere Eccleſiæ non debet.* Cro. Eliz. 479, 578. Lutw. 1062.

15. But if a Rector let his Glebe, the Tenant is liable to pay the ſmall Tithes, ariſing thereupon to the Vicar, and the great to the Rector. Bro. Diſm. pl. 17. Cro. Eliz. 479, 578.

16. For the ſame Reaſon the Vicar of a Pariſh ſhall not during the Time he occupies his own Glebe pay any Tithes, ariſing thereupon, to the Rector or Impropriator of the Pariſh. 1 Brownl. 69. Harris v. Cotton.

17. But if a Vicar let his Glebe, the Tenant is liable to pay the great Tithes, ariſing thereupon, to the Rector or Impropriator, and the ſmall to the Vicar. Ibid.

Hetl. 31. Booth v. Franklin. Fitzg. 79.

18. An Impropriator is likewiſe exempted from the Payment of the ſmall Tithes, ariſing upon his Glebe, to the Vicar, ſo long as it is in his own Hands; for the Maxim extends to him alſo.

Hetl. 31. Booth v. Franklin. Fitzg. 79.

19. But if an Impropriator let his Glebe, the ſmall Tithes ariſing thereupon are due to the Vicar, and the great to himſelf.

1 Brownl. 69. Harris v. Cotton.

20. If a Rector, Vicar or Impropriator, who has ſown his Glebe, die before the Corn is ſevered, the Executor of the Rector, Vicar or Impropriator, muſt pay Tithe thereof: For although an Executor be in the general the Repreſentative of his Teſtator, he is not ſo in his Spiritual Capacity.

(A) Of a Modus Decimandi.

1. In the general.

1. A *Modus* is a real Compoſition for Tithe.

Hardr. 381. Ingoldſby v. Ward. 2 Will. 523.

2. It is probable, that every *Modus* had its Commencement by Deed: Becauſe a Compoſition for Tithe can never become a *Modus*, unleſs the Patron and Ordinary be Parties thereto, or it be confirmed by them.

Mar. 87. Hitchcock v. Hitchcock.

3. A Vicar and a Pariſhioner had made an Agreement, that, for the Time to come, a certain Sum of Money ſhould be paid annually in Lieu of Tithes; and it was confirmed by the Biſhop. This was holden to be only a perſonal Contract, and not ſuch a real Compoſition as would bind the Succeſſor to the Vicar.

11 Rep. 19. Graunt's Caſe. 2 Mod. 321. Cro. Ja. 501. 2 Will. 523.

4. A *Modus* may be preſcribed for, without producing the Deed, by which the Compoſition was at firſt agreed upon: For wherever there has been, for Time immemorial, a conſtant annual Payment in Lieu of Tithe, it ſhall be intended that the Payment had a proper Commencement.

5. A *Modus* is not good, unleſs the Compoſition were at firſt reaſonable.

2 Will. 573, 574. Chapman v. Monſon.

6. It is not however at this Day neceſſary to ſhew that the Compoſition was at firſt reaſonable: For there might be, when the Compoſition was agreed upon, ſome Circumſtance which then made it reaſonable, although this cannot, at ſo great Diſtance of Time, be ſhewn.

7. A *Modus* muſt, at its Commencement, have been a Recompence to the Perſon, to whom the Tithe was due in Lieu of which it was to be paid.

1 Roll. Abr. 649. pl. 8.

8. If a Man preſcribe to be diſcharged of Tithe, in Conſideration of being obliged to repair the Body of the Church, this is not a good *Modus:* Becauſe, as the Parſon was never obliged to repair the Body of the Church, this could never have been a Recompence to him.

2 Roll. Abr. 650. pl. 9.

9. But if a Man preſcribe to be diſcharged of Tithe, in Conſideration of being obliged to repair the Chancel, this is a good *Modus:* For this muſt always have been a Recompence to the Parſon, he being bound to repair the Chancel.

2 Will. 573. Chapman v. Monſon.

10. It is not at this Day neceſſary, for the Party who would avail himſelf of a *Modus* to ſhew, that it was originally a Recompence to the Perſon, to whom the Tithe was due in Lieu of which it was to be paid: For unleſs it appear, upon the Face of the Preſcription, not to have been ſo, it ſhall be intended that it was.

11. It

11. It is laid down, that a *Modus* by Preſcription may be good againſt a Vicar. Godb. 180.

12. But the better Opinion ſeems to be, that, as every *Modus* by Preſcription muſt have begun at a Time whereof there is no Memory, no *Modus* by Preſcription can be good againſt a Vicar; becauſe the Endowment of all Vicarages has been within Time of Memory. 2 Will. 522.

13. It has been holden, that a *Modus* by Preſcription, to be paid to the Rector in Lieu of all Tithes ariſing in the Pariſh, is a Diſcharge of Tithes as againſt the Vicar. 1 Mod. 216.

14. The Thing paid as a *Modus* is uſually a Sum of Money.

15. But the Payment of a Chattel as a *Modus* is good; becauſe the original Agreement might as well have been, that a Chattel ſhould be paid in Lieu of Tithes, as that Money ſhould. Salk. 656. Ld. Raym. 360.

16. It is a good *Modus* to preſcribe, that the Parſon and his Predeceſſors have, for Time immemorial, been ſeized in Fee of one or more Cloſes of Land lying in the Pariſh; and have conſtantly received the Profits thereof, in Lieu of a particular Species of Tithe, or in Lieu of all Tithes ariſing in the Pariſh. Hob. 42. Cro. Ja. 501. Cro. Eliz. 587, 736.

17. An indirect *Modus* is good.

18. A Suit being inſtituted for Tithes in Kind by the Parſon of *B.* the Defendant moved for a Prohibition; and inſiſted, that he was an Inhabitant of the Pariſh of *A.* that every Inhabitant of the Pariſh of *A.* who held any Paſture Land in the Pariſh of *B.* had, for Time immemorial, paid Tithes thereof to the Parſon of *A.* and that the Parſon of *A.* had always paid Two-pence for every Acre of ſuch Paſture to the Parſon of *B.* A Prohibition was granted. And by the Court—It is exactly the ſame Thing, as if the Defendant had preſcribed directly, for a *Modus* of Two-pence, for every Acre of Paſture occupied by him in the Pariſh of *B.* Cro. Eliz. 136. Cotferd *v.* Peaſe.

19. Tithe is ſo abſolutely and effectually diſcharged by a *Modus*, that although this be not paid, the Right of taking the Tithe in Kind cannot be again reſorted to. Hob. 41, 42, 44.

20. If a Man through Ignorance ſet out Corn for Tithe, upon Land diſcharged of Tithe by a *Modus*, and the Parſon take it away, an Action of Treſpaſs lies againſt him. Hob. 42. Cooper *v.* Andrews.

21. A *Modus* is not deſtroyed, by the Payment of Tithe in Kind for ſome Years. 2 Bulſtr. 240. Price *v.* Maſcal.

22. On the other Hand a *Modus* muſt be paid every Year, although no Tithe would have been due: For the *Modus*, it being a Recompence for the Tithe, becomes a Spiritual Fee. Hob. 42, 44.

23. If the Land, for which there is a *Modus*, lie freſh, the *Modus* muſt nevertheleſs be paid. Hardr. 184. Holbeach *v.* Whadcock.

24. If there be a *Modus* to pay thirty Eggs, in Lieu of the Tithe of all Eggs, the thirty Eggs muſt at all Events be paid. 1 Roll. Abr. 648. pl. 3. Salk. 657. Ld. Raym. 360.

2. Of the Certainty required in a *Modus*.

25. A *Modus* muſt be certain as to the Sum of Money, or other Thing, which is to be paid.

26. A *Modus*, to pay two Shillings in the Pound of the yearly Rent of the Land, is void: Becauſe, as the yearly Rent may be raiſed or fallen at Pleaſure, the Sum of Money to be paid muſt always be uncertain. 12 Mod. 563. Salk. 657. Ld. Raym. 697. Bunb. 20, 126.

2 Roll. Abr. 265. D. pl. 2. 2 Will. 572. 27. A *Modus*, to pay one Penny or thereabouts for every Acre of Land, is void; by Reaſon of the Uncertainty of the Sum of Money to be paid.

Bunb. 272. Manwaring v. Clark. 28. But it has been holden, that a *Modus*, to deliver nine Cart Loads of Logwood in Lieu of all Tithes, is certain enough.

29. The Thing for which a *Modus* is to be paid, muſt likewiſe be certain.

2 Will. 462. Carleton v. Brightwell. 30. The Defendant in a Suit for Tithe inſiſted, that the Inhabitants of a certain Tenement had been accuſtomed to pay a Sum of Money as a *Modus*, for the Tithe of all Corn, grown upon the Lands *uſually enjoyed therewith*. The *Modus* was holden to be void for Uncertainty; becauſe the Words *uſually enjoyed therewith* do imply, that the ſame Lands had not been conſtantly enjoyed with the Tenement.

Bunb. 129. Burwell v. Coates. 31. It has been holden, that a *Modus* for a Farm is void: Becauſe a Farm does not conſiſt of any certain Quantity of Land.

Bunb. 160. Finch v. Malſters. 32. But if in preſcribing for a *Modus* for a Farm, the Quantity of Land of which the Farm conſiſts be ſpecified, the *Modus* is good.

33. And it is not neceſſary, that the Thing, for which *Modus* is to be paid, ſhould be always deſcribed with Certainty in preſcribing for the *Modus*: Becauſe, if from what is alledged the Thing can fairly be aſcertained, the *Modus* is good; it being a Maxim of Law, *Certum eſt quod Certum reddi poteſt.*

2 Will. 572. 34. A *Modus*, to pay Twelve-pence for every Acre of Upland, was holden to be good: Becauſe what is Upland may be aſcertained.

2 Will. 572. Chapman v. Monſon. 35. The Preſcription was, that every Perſon living out of a Pariſh ſhould pay Four-pence, for every Acre of Meadow or Paſture occupied by him in the Pariſh. This was decreed to be a good *Modus*; Lord *King* Chancellor, and *Reynolds* and *Forteſcue*, the two Juſtices who aſſiſted him, being of Opinion, that it was certain enough; for that there is no great Difficulty, in aſcertaining the Number of Acres of Meadow or Paſture occupied by a Perſon in a Pariſh.

2 Roll. Abr. 651. pl. 3. 36. A *Modus* for a Park is good, although the Quantity of Land of which it conſiſts be not mentioned; for a Park is ſufficiently aſcertained by its Boundaries.

1 Roll. Abr. 651. pl. 4. 37. But if a Park be diſparked, the *Modus*, unleſs the Occupier of the diſparked Land alledge, that it is to be paid for a certain Quantity of Land, is void.

8 Mod. 375. Bunb. 105, 171, 173. 38. The Time of paying, what is to be paid as a *Modus*, muſt likewiſe be certain.

Bunb. 198. Blacket v. Finn. 39. If the *Modus* be to pay a Sum of Money yearly, in Lieu of Tithe, on or about the firſt Day of *May*; this is not a good *Modus*, becauſe the Time of Payment is uncertain.

Bunb. 173. Phillips. v. Simes. 40. The Preſcription was, to pay a Sum of Money, as a *Modus* for the Tithe of Sheep, at *Eaſter*, or when the Sheep ſhall be ſold. The *Modus* was holden to be void, by Reaſon of the Uncertainty of the Time of Payment.

3. Of a *Modus*, which amounts to a Preſcription in *non Decimando.*

Cro. Jac. 47. Webb v. Warner. Ld. Raym. 677. 41. A *Modus*, to pay the Tithe of Part of a Thing, which is titheable of common Right, in Diſcharge as the Tithe of the whole Thing, is void.

42. If the *Modus* be, to pay the Tithe of Hay grown upon ſome Lands, in Diſcharge of the Tithe of Hay grown upon all other Lands in the Pariſh,

Pariſh, the *Modus* is bad; for, as it is only a Recompence as to Part, it amounts to a Preſcription *in non Decimando*, as to the Reſidue of the Hay grown in the Pariſh.

43. The *Modus* was, to pay the Tithe of Milk Part of the Year, in Diſcharge of the Tithe of Milk for the whole Year, the *Modus* was holden to be void: Becauſe it is, in Effect, a Preſcription *in non Decimando* as to Milk for Part of the Year. Ld. Raym. 360. Hill v. Vaux. Cro. Eliz. 609. Salk. 656. 12 Mod. 206. Bunb. 307.

44. But if the Tithe of a Thing, as of Wood, be only due by Cuſtom, a *Modus* to pay the Tithe of Part thereof, in Diſcharge of the Tithe of the whole, is good: Becauſe there may be a Preſcription *in non Decimando*, as to Part of ſuch Thing. Salk. 656. Ld. Raym. 137. 12 Mod. 111.

45. If the Tithe of Part of a Thing which is titheable of common Right, be by a *Modus* made more valuable, the *Modus*, although it is to be paid in Diſcharge of the Tithe of the whole Thing, is good; becauſe ſuch *Modus* may be a Recompence for the Tithe of the whole Thing. Hob. 250. Salk. 656. 12 Mod. 206. Ld. Raym. 360. 2 Will. 521.

46. A *Modus*, to pay the tenth Cheeſe from the firſt Day of *May* until the firſt Day of *Auguſt*, in Diſcharge of the Tithe of Milk for the whole Year, is good: Becauſe, by the Labour of making it into Cheeſe, the Tithe of Milk is made more valuable ſo long as it is paid. Cro. Eliz. 609. Auſtin v. Lucas.

47. A *Modus*, to pay a Quantity of a Thing, which is titheable of common Right, in Diſcharge of the Tithe of the whole thereof, which a Man may happen to have, is a good *Modus*.

48. A *Modus*, to pay thirty Eggs of the Produce of a Man's own Hens, in Diſcharge of all Tithe of Eggs would be void: For, as thirty Eggs may not be the Tithe of all the Eggs a Man has, ſuch a *Modus* may amount to a Preſcription *in non Decimando* as to ſome Eggs. Ld. Raym. 360. Hill v. Vaux.

49. But a *Modus* to pay thirty Eggs, in Diſcharge of the Tithe of all the Eggs a Man may happen to have, is good: For theſe Eggs, which are not to be conſidered as Tithe, muſt be paid at all Events; whether the Perſon, who is to pay them, have Hens or not. 1 Roll. Abr. 648. pl. 3. Ld. Raym. 360.

50. A *Modus* for the Tithe of one Thing, which is titheable of common Right, can never be a Diſcharge of the Tithe of another Thing, which is likewiſe titheable of common Right.

51. The *Modus* was, to pay one Penny for every Mare; and it was alledged, that this was to be a Satisfaction for the Tithe of Horſes, Mares and Colts. This *Modus* was holden to be void: Becauſe a *Modus* for one Thing, which is titheable of common Right, it being in Fact only a Recompence for the Tithe of that Thing, can never be a Recompence for the Tithe of another Thing which is likewiſe titheable of common Right; and conſequently ſuch Modus, which amounts to a Preſcription *in non Decimando* as to the other Thing, is void. Cro. Eliz. 446. Gryſman v. Lewes.

4. Of a *Modus*, which has not been conſtantly paid.

52. It is laid down, that if a *Modus* have not been conſtantly paid, it is deſtroyed. Salk. 656. The Archbiſhop of York v. the Duke of Newcaſtle.

53. And it has been holden in one Caſe, that if a *Modus* be for the Tithe of Hay, grown upon a certain Piece of Land, and the Land be converted into arable Land, the *Modus* is deſtroyed. 2 Roll. Abr. 651. Sharp v. Coult.

54. But it is in other Caſes laid down, that, although the Payment of a *Modus* be ſuſpended or ceaſe for a Time, it may be revived again.

Godb. 194. Brown's Caſe.

55. In one Caſe the contrary to what was holden in the Caſe of *Sharp* and *Coult* is laid down expreſsly: For it is laid down, that if there be a *Modus* for the Tithe of Hay, grown upon a certain Piece of Land, the *Modus* is only ſuſpended by converting the Land into arable Land, and revives again whenever Hay is grown thereupon.

1 Roll. Rep. 121. Hooper *v.* Andrews.

56. In another it is laid down, that if an Orchard, for which there is a *Modus*, be diſorcharded, the *Modus* is ſuſpended: But that, whenever the ſame Ground is again converted into an Orchard, the *Modus* is revived.

2 Bulſtr. 240. Price *v.* Maſcal.

57. In another it is laid down, that a *Modus* is not deſtroyed, by the Payment of Tithes in Kind for ſome Years.

2 Will. 572. Chapman *v.* Monſon. Hil. 3 Geo. 2.

58. And the Doctrine of theſe three Caſes is adhered to, and confirmed, in a modern Caſe.

5. Of a leaping *Modus*.

1 Eq. Ca. Abr. 369.

59. It is not, as has been already obſerved, neceſſary, that a *Modus* ſhould have been conſtantly paid, yet a *Modus* muſt, when paid, have been conſtantly paid in the ſame Manner; otherwiſe it is called a leaping *Modus*, and is therefore void.

Select Ca. in Chan. 52. Webber *v.* Taylor.

60. The *Modus* was, to pay a certain Sum of Money for the Tithe of certain Premiſſes, whilſt they continue in certain Hands: But if the Premiſſes ſhould come into other Hands, then the ſaid Sum or Tithes in Kind were to be paid at the Election of the Parſon. This *Modus* was holden to be bad. And by the Court—There cannot be a leaping *Modus*.

6. Of a *Modus*, which is too rank.

61. Wherever the Sum of Money, or other Thing paid as a *Modus*, is of greater Value, than it can be fairly ſuppoſed the Tithes, for which it is paid, were at the Time of its Commencement worth, ſuch *Modus*, which is called a too rank *Modus*, is void.

11 Mod. 60. Startup *v.* Dodderige. Paſch. 4 Ann.

62. A Prohibition was refuſed, becauſe the *Modus* appeared to be too rank. And by *Holt* Chief Juſtice—Wherever a *Modus* runs too high, the Preſumption is ſtrong, that it is not a *Modus*.

63. In a Caſe about two Years after, the contrary was laid down.

Vin. Abr. Tit. Diſmes, D. a. pl. 47. Pole *v.* Gardiner, Mar. 5, 1707.

64. The *Modus* appearing too rank, it was decreed by the Court of Exchequer to be a temporary Compoſition, and not a *Modus*: But the Decree was reverſed; for Churches may have been endowed with more than the Value of the Tithes.

65. But it has been ſince holden in divers Caſes, that a *Modus*, which is too rank, is void.

Bunb. 10. Benion *v.* Watkins, Hil. 3 Geo. 1.

66. In one Caſe, a *Modus* of five Shillings for every Acre of Wheat was holden to be void, as being too rank; becauſe five Shillings is very near, if not quite the Value, of the Tithe of an Acre of Wheat at this Day.

Bunb. 78, 79. Bennet *v.* Jenkins. Trin. 7 Geo. 1.

67. In another, a *Modus* of one Shilling for a Milch Cow was holden to be void, becauſe it is too rank. And by the Court—A Shilling was, at the Time this *Modus* muſt be ſuppoſed to have had its Commencement, half the yearly Value of the Milk of a Cow.

65. And

68. And in the ſame Caſe a *Modus* of Sixpence for a Calf was holden to be too rank.

69. The Reporter of this Caſe does indeed ſay, in a Note, that ſince this Caſe a *Modus* of Sixpence for a Calf has been holden to be good.

70. And in another Caſe, not two Years before that of *Bennet* v. *Jenkins*, a *Modus* of Eleven-pence for a Milch Cow and one of Sixpence for a Calf were both holden to be good. Bunb. 57. Roe v. The Biſhop of Exeter, Hil. 6 Geo. 1.

71. It may, upon comparing the two laſt Caſes, be doubtful, whether a Shilling be too rank a *Modus* for a Milch Cow and Sixpence for a Calf: But they both confirm the Doctrine, that a *Modus* which is too rank, is void; for the two Queſtions, whether a particular *Modus* be too rank, and whether a *Modus* which is to rank be void, are quite diſtinct and independent of each other.

7. Of a *Modus*, which is liable to Fraud.

72. A *Modus* of one Penny, for the Tithe of all Hay ariſing upon a Farm, being preſcribed for, it was objected, that the *Modus* is liable to Fraud; for that all the Land may be turned into Meadow, and then only one Penny will be paid for the Tithes of the whole Farm: But the *Modus* was holden to be good. Bunb. 162. Finch v. Maſters.

73. The *Modus* was, that every Perſon, who lived out of a Pariſh, ſhould pay Fourpence, for every Acre of Meadow or Paſture occupied by him in the Pariſh. It was objected, that ſuch a *Modus* is liable to great Fraud; for that many Perſons would live out of the Pariſh, to avoid paying Tithes in Kind; and others would, by threatning to leave the Pariſh if he did not do it, compel the Parſon, to take leſs than the Worth of his Tithes. It was anſwered, that, if the being liable to Fraud is an Objection to the Goodneſs of a *Modus*, ſcarce any *Modus* will be good; becauſe every one is in ſome Degree liable to Fraud. The *Modus* was holden to be good. 2 Will. 569, 571, 572. Chapman v. Monſon.

8. Of a *Modus* for ſuch Perſons as live out of the Pariſh.

74. It has been holden, that a *Modus*, for ſuch Perſons as live out of the Pariſh, is unreaſonable; for that the Inhabitants of the Pariſh, as being liable to the Charge of the Repairs and Veſtments of the Church, ought to be moſt favoured in the Payment of Tithes. 1 Lev. 116. Bawdry v. Buſhell.

75. But in a modern Caſe ſuch a *Modus* was holden to be good; and the Opinion of the Court, in the Caſe of *Bawdry* v. *Buſhell*, is not only ſaid to have been a haſty one: But the Ground of it, namely, that only Pariſhioners are liable to the Charges of Repairs and Veſtments of the Church, is expreſsly denied to be Law. 2 Will. 567, 674. Chapman v. Monſon.

9. Of the Extent of a *Modus*.

76. A *Modus* for a Garden extends only to the antient Ground of the Garden; for, if more Ground be laid to the Garden, the *Modus* does not extend thereto. Bunb. 79. Perrot v. Markworth.

Lutw. 1074. Bunb. 79, 344. 77. If a *Modus* be, to pay at the Rate of a certain Sum by the Acre, for the Tithe of all Hay grown in the Pariſh, the *Modus* extends to Clover, Sainfoin, and all other Things of the Graſs Kind, although the Cultivation of ſome of theſe has been lately introduced into the Pariſh.

Fitzgib. 53. Fox v Ade 78. But if a *Modus* be, for the Tithe of all Hay grown in the Pariſh, or for the Tithe of all Hay grown upon a particular Farm in the Pariſh, the *Modus* extends only to the antient Meadow of the Pariſh or Farm.

1 Roll. Abr. 651. Ruſſel v. More, Trin. 39. Eliz. 79. It has been holden, that if a Mill be erected upon a Piece of Land, for which there is a *Modus*, the *Modus* extends to the Mill.

Cro. Ja. 424. Anon. Trin. 15 Ja. 1. 80. But this Caſe does not ſeem to be Law: For in a later Caſe it was holden, that a Mill, although it be erected upon Land diſcharged of Tithes, is liable to the Payment of Tithe.

4 Mod. 45. Grimley v. Falkingham. 81. If there be a *Modus* for a Mill, in which there has always been but one Pair of Stones; and a ſecond Pair of Stones be added to the Mill, the *Modus* extends to theſe.

1 Roll. Abr. 641. pl. 1. 82. If the Stream of a Mill, for which there is a *Modus*, be by the Act of God changed from its uſual Courſe; and afterwards the Owner pull that Mill down, and erect a new Mill upon the new Stream, the Modus extends to the new Mill.

Ibid. 83. But, if the Stream had been changed by the Act of the Owner, the new Mill would have been liable to the Payment of Tithe.

(S) Of a Preſcription in non Decimando.

1 Roll. Abr. 653. Cro. Eliz. 206, 216, 511. Cro. Car. 423. 1. A Spiritual Perſon may preſcribe *in non Decimando*; becauſe every ſuch Perſon was, at the Common Law, capable of receiving a Grant of Tithes.

2. Another and the principal Reaſon is, that the Church does not loſe any Thing by ſuch Preſcription; a Spiritual Perſon having the Benefit thereof.

1 Roll. Abr. 653. pl. 6. 3. The Churchwardens of a Pariſh, although they hold Land for repairing the Church, cannot preſcribe *in non Decimando* for the Land: Becauſe they are not Spiritual Perſons.

1 Roll. Abr. 656. pl. 4. Cro. Eliz. 216, 512, 783. Moor 219. 4. If a Layman be Tenant for Years to a Spiritual Perſon of Land which is diſcharged of Tithes, he may preſcribe *in non Decimando* for the Land; becauſe, as the Poſſeſſion of the Tenant is in Point of Law the Poſſeſſion of the Landlord, the Preſcription in this Caſe would be in the Right of a Spiritual Perſon.

Cro. Car. 423. Hardr. 315. 2 Keb. 29. 5. But if a Spiritual Perſon grant an Eſtate of Inheritance in Land, for which the Spiritual Perſon might himſelf have preſcribed *in non Decimando*, to a Layman, the Grantee cannot preſcribe *in non Decimando*: Becauſe the Preſcription would be in his own Right.

Cro. Eliz. 784. Crouch v. Fryer. Yelv. 2. 6. It has however been holden, that a Layman who holds Land by Copy of Court-Roll of a Manor diſcharged of Tithes, may preſcribe *in non Decimando* for the Land; although he has an Eſtate of Inheritance therein.

7. A

7. A Layman may prescribe *in modo Decimandi*: But he cannot prescribe *in non Decimando*, for any Thing which is titheable of common Right: Because a Layman was not, as the Common Law, capable of receiving a Grant of Tithes; and it has been holden in Favour of the Church, that the Right to Tithes cannot be taken away, unless an actual Recompence be paid for the same; or unless the Instrument, by which the Land has been thereof discharged, be produced. 11 Rep. 13. 1 Rol. Abr. 653. Cro. Eliz. 293, 512, 599, 763. Hob. 296. 2 Will. 573.

8. It has been holden in two modern Cases, that a Layman can no more prescribe *in non Decimando* against an Impropriator than against a Rector; for that both are equally intitled of common Right to Tithes. Bunb. 325. Charlton *v.* Charlton. Ibid 345. The Corporation of Bury *v.* Evans.

9. It is said to have been holden in one Case, that the Inhabitants of two Hundreds may prescribe *in non Decimando*, for a Thing which is titheable of common Right. 1 Roll. Abr. 654. Kidden *v.* Edwards, Pasch. 15 Car. 1.

10. But in a subsequent Case it is laid down, that neither the Inhabitants of two Hundreds, nor of a whole County, can prescribe *in non Decimando*, for a Thing which is titheable of common Right: And it is added, that as no single Inhabitant of a Hundred or County can in such Case prescribe *in non Decimando*, it would be absurd to hold, that all the Inhabitants of a Hundred or County may. Ld. Raym. 137. Hicks *v.* Woodson, Hil. 8. W. 3. 12 Mod. 111. Salk. 655.

11. It is indeed true, that a Prescription *in non Decimando*, for Wood, by the Inhabitants of a Hundred, has been holden good: But no Inference can be drawn from thence; because Tithe of Wood, which does not renew annually, is not due of common Right, for in antient Times it was only paid in particular Places by Custom. Ld. Raym. 137. 12 Mod. 111. Salk. 656. Comb. 404.

(T) Of a Discharge of Tithes by Grant.

1. A Layman was not, at the Common Law, capable of receiving a Grant of Tithes. 1 Rep. 45. 11 Rep. 13. Cro. Eliz. 293, 599, 763. Hob. 296.

2. But the Land of a Layman could, at the Common Law, have been discharged of Tithes by Grant, provided the Parson, Patron and Ordinary were all Parties thereto. 2 Rep. 44. Bishop of Winchester's Case.

3. And a Discharge of Tithes by such Grant, in Case it were obtained before the restrictive Statutes, is at this Day good. 2 Will 573. Chapman *v.* Monson, Cro. Car. 423.

4. A Layman cannot avail himself of a Discharge of Tithes by Grant, unless he produced the Deed of Grant: For if this be not produced, Tithes must be paid, although none have been paid within Time of Memory; because a Layman cannot prescribe *in non Decimando*. 2 Will. 573. Chapman *v.* Monson. 11 Rep. 13. 1 Rol. Abr. 653. Cro. Eliz. 293, 512, 599, 763. Hob. 296.

(U) Of

(U) Of a Diſcharge of Tithes by Bull.

2 Inſt. 652, 653. 1. SPIRITUAL Perſons did heretofore frequently purchaſe Bulls from the Pope, for diſcharging their Lands of the Payment of Tithes.

Cro. Ja. 454. 2 Rep. 44. 2. The Practice of doing this ſeems to have been more prevalent after the Ordinance of Pope *Paſcal* the Second, by which it was ordained, that only the Lands of the *Ciſtercians*, *Hoſpitallers* and *Templars*, ſhould be exempted from the Payment of Tithes.

2 Inſt. 653. 3. It was the Opinion of *Coke* Chief Juſtice, that the Pope never had the Power of diſcharging any Land, belonging to a Subject of this Realm, of the Payment of Tithes.

4. For the Sake of removing all Doubt as to this, and of putting a Stop to the Practice of purchaſing Bulls for diſcharging Land of the Payment of Tithes, it is by the 7 *H.* 4. *c.* 6. after reciting, that the Order of the *Ciſtercians* in this Realm had purchaſed certain Bulls, to be diſcharged of the Tithes of their Lands let to Farm, enacted, "That the Religious of the "Order of *Ciſtercians* ſhall be in the State they were in, before ſuch Bulls "were purchaſed; and that if they of the ſaid Order or any other, Religious or Seculars, of whatſoever State or Condition they be, do put the "ſaid Bulls in execution, or do from henceforth purchaſe other ſuch "Bulls; or by Colour of the ſame Bulls, purchaſed or to be purchaſed, "do take Advantage in any Manner; a Writ of *Præmunire facias* ſhall "go againſt them."

(W) Of a Diſcharge of the Payment of Tithes by Order.

1. IN antient Times, Monks of all Orders were diſcharged of the Payment of Tithes.

Cro. Ja. 454. 2 Rep. 44. Cro. Ja. 57. 2 Inſt. 652. 2. But as Monks in Proceſs of Time increaſed to a great Degree, and had ſuch large Poſſeſſions, that Holy Church was thereby greatly impoveriſhed, *et Filia devoravit Matrem*, Pope *Paſcal* the Second ordained, that Monks of all Orders, except the *Ciſtercians*, *Templars* and *Hoſpitallers* or of *St. John of Jeruſalem*, ſhould be liable to the Payment of Tithes.

2 Rep. 44. Cro. Ja. 454. 2 Inſt. 652. Cro Ja. 57. 3. This Ordinance being found inſufficient to prevent the Impoveriſhment of the Church, another was ſome Time after made by Pope *Adrian* the Fourth; by which even the Lands of thoſe three Orders, except the Lands *quæ propriis manibus excoluntur*, were rendered liable to the Payment of Tithes.

Ante. 64. 4. The Privilege of being diſcharged of Tithes extended only to ſuch Lands, as thoſe three Orders were poſſeſſed of about the Year 1200; for all parochial Tithes being at that Time appropriated, to the Perſons who had the Cure of Souls in the reſpective Pariſhes, it followed, that if Land in a Pariſh were afterward granted to either of theſe Orders, it would be liable to the Payment of Tithes.

Cro. Ja. 608. Gerrard v. Wright. 5. As a Diſcharge of Tithes by Order was perſonal, every ſuch Diſcharge muſt, upon the Diſſolution of the religious Houſes to whoſe Perſons it

it was annexed, have been at an End, if it had not been continued by one or more Statutes.

6. By the 31 *H.* 8. *c.* 13. *par.* 21. it is enacted, "that the King his "Heirs and Succeſſors, and every Perſon his Heirs and Aſſigns, which "hath or hereafter ſhall have any Manors, Lands, Tenements or other "Hereditaments whatſoever, which belonged or now belong unto any "Monaſteries, Abbathies, Priories, Nunneries, Colleges, Hoſpitals, Houſes "of Friars or other Religious and Eccleſiaſtical Houſes or Places, ſhall "have, hold and enjoy the ſaid Manors, Lands, Tenements and other "Hereditaments whatſoever, and every of them, diſcharged and acquitted "of the Payment of Tithes, as freely, and in as ample a Manner, as the "ſaid late Abbots, Priors, Abbeſſes, Prioreſſes and other Eccleſiaſtical "Governors and Governeſſes or any of them had, held, occupied, poſſeſ-"ſed or enjoyed the ſame, or any Parcel thereof, at the Days of their Diſſo-"lution, Suppreſſion, renouncing, relinquiſhing, forfeiting, giving up or "coming to the King's Highneſs, of ſuch Monaſteries, Abbathies, Prio-"ries, Nunneries, Colleges, Hoſpitals, Houſes of Friars, or other Reli-"gious or Eccleſiaſtical Houſes or Places, or any of them."

7. By this Statute the Privilege of being diſcharged of Tithes, which the Monks of the Order of *Ciſtercians*, *Templars*, *Hoſpitallers*, or of *St. John of Jeruſalem*, had enjoyed for all the Lands *quamdiu propriis manibus excoluntur*, which they were poſſeſſed of before the Appropriation of parochial Tithes, was continued to ſuch of theſe Lands as were thereby veſted in the Crown. Cro. Ja. 57, 688. Cro. Car. 24. Hob. 306.

8. It has been holden, that if Land, heretofore diſcharged by Order of Tithes, be at this Day diſcharged of Tithes, a Right of Common, either appendant or appurtenant to the Land, is likewiſe diſcharged thereof. Bunb. 138. Lambert *v.* Cumming.

9. Evidence of a great Tithe having been paid for Land, whilſt it was in the Hands of the Monks of an Order capable of a Diſcharge of the Payment of Tithes, is the beſt Evidence, which can at this Day be given, that the Monks were not poſſeſſed of the Land before the Appropriation of parochial Tithes. Bunb. 122. Lord *v.* Turk.

10. But Evidence of the Payment of a ſmall Tithe for Land, whilſt it was in the Hands of the Monks of an Order capable of a Diſcharge of the Payment of Tithe is not Evidence of this: Becauſe Lands diſcharged by Order were only diſcharged of the Payment of great Tithes. Clayt. 53. pl. 92.

11. A Tenant for Life, of Land which was diſcharged by Order of the Payment of Tithes at the Time of the Diſſolution of the Religious Houſe to which it belonged, is not at this Day diſcharged of the Payment of Tithes; for the Conſtruction of the 31 *H.* 8. *c.* 13. has always been, that the Privilege, of being thereby diſcharged of the Payment of Tithes, is only continued to thoſe who have an Eſtate of Inheritance in the Land. Hardr. 174, 190. Wilſon *v.* Redman. Clayt. 53.

12. It was found by a ſpecial Verdict, that the Lands in Queſtion, heretofore belonging to an Abbey of *Ciſtercian* Order, were diſcharged of the Payment of Tithes *quamdiu propriis manibus excoluntur*; that theſe Lands were in Leaſe for Years, at the Time of their being veſted in the Crown by the 31 *H.* 8. *c.* 13. and that the Leaſe was now expired: And the Queſtion was, whether the Grantee in Fee of the Crown, ſhould be diſcharged of the Payment of Tithes *quamdiu propriis manibus excoluntur*? It was holden, that he ſhould: And by the Court—Although the Tenant for Years paid Tithes for the Lands at the Time of the Diſſolution of the Abbey; yet as the Abbot would have holden them, in Caſe the Leaſe thereof had expired before the Diſſolution, diſcharged of the Payment of Tithes *quamdiu propriis manibus excoluntur*, the Grantee of the Crown ought to hold them in the ſame Manner. Cro. Ja. 559. Porter *v.* Bathurſt. Cro. Ja. 454. Hardr. 190.

13. By the 27 *H.* 8. *c.* 28. *par.* 1. all Religious and Eccleſiaſtical Houſes, whoſe Poſſeſſions were not of the Value of more than two Hundred Pounds

a Year, were to be diſſolved; and the Lands, Tenements, Tithes and other Hereditaments, of ſuch Religious and Eccleſiaſtical Houſes were to be veſted in the Crown.

14. And by *par.* 2. it is enacted, "That every Perſon, who now hath, "or hereafter ſhall have, any Letters Patent of the King's Highneſs of the "Lands, Tenements, Tithes or other Hereditaments, which appertained "to any Religious Houſe heretofore diſſolved, or which appertaineth to "any Religious Houſe that ſhall be ſuppreſſed or diſſolved by the Autho-"rity of this Act, ſhall have and enjoy the ſaid Lands, Tenements, Tithes "and other Hereditaments, ſpecified in their Letters Patent, in like Man-"ner, Form and Condition, as the Abbots, Priors, Abbeſſes, Prioreſſes "and other Chief Governors, had or ought to have had the ſame, if they "had not been ſuppreſſed or diſſolved."

Hob. 306. Cro. Ja. 57, 608. Cro.Car. 24.

15. It has been frequently determined, that no Land, heretofore diſcharged by Order of the Payment of Tithes *quamdiu propriis manibus excoluntur*, which in Purſuance of this Statute was veſted in the Crown, is diſcharged of the Payment of Tithes.

16. There is in the 31 *H.* 8. *c.* 13. a Clauſe in the third Paragraph to the ſame Effect, concerning the Lands of Religious Houſes thereby veſted in the Crown: But it is plain, from a ſubſequent Clauſe in the twenty-firſt Paragraph of the 31 *H.* 8. *c.* 13. by which ſuch Lands are diſcharged of the Payment of Tithes, that the Legiſlature were ſenſible, that ſuch Lands were not diſcharged thereof by the former Clauſe; for if they had been thereby diſcharged, the inſerting of another Clauſe of Diſcharge would have been altogether nugatory.

17. By the twenty-firſt Paragraph of the 31 *H.* 8. *c.* 13. only ſuch Lands, heretofore diſcharged by Order of the Payment of Tithes *quamdiu propriis manibus excoluntur*, are diſcharged of the Payment of Tithes, as came to the Hands of King *Henry* the Eighth *after the fourth Day of February* in the twenty-ſeventh Year of his Reign.

Hob. 306. Cro. Ja. 57, 608. Cro.Car. 24.

18. In Conſequence of this it has been holden, that no Land, heretofore diſcharged by Order of the Payment of Tithes *quamdiu propriis manibus excoluntur*, which was veſted in the Crown in Purſuance of the 27 *H.* 8. *c.* 28. was diſcharged of the Payment of Tithes by the 31 *H.* 8. *c.* 13. for, as the Lands veſted in the Crown by the former of theſe Statutes, were by Relation veſted *upon the fourth Day of February* in the twenty-ſeventh Year of the Reign of King *Henry* the Eighth, that being the firſt Day of the Seſſion of Parliament in which the 27 *H.* 8. *c.* 28. was made, the latter Statute cannot extend to thoſe Lands.

2 Rep. 46. The Archbiſhop of Canterbury's Caſe. Trin. 38 Eliz. Cro. Ja. 58.

19. It has been holden in two Caſes, that Lands, heretofore diſcharged by Order of the Payment of Tithes *quamdiu propriis manibus excoluntur*, which were veſted in the Crown by the 32 *H.* 8. *c.* 24. are not at this Day diſcharged of the Payment of Tithes.

Cornwallis *v.* Spalding, Hil. 44 Eliz.

2 Rep. 46. The Archbiſhop of Canterbury's Caſe.

20. As there is no Diſcharging-Clauſe in this Statute, ſuch Lands muſt, if they are diſcharged of the Payment of Tithes, be diſcharged by the 31 *H.* 8. *c.* 13.

21. It does indeed appear, upon comparing the Diſcharging-Clauſe in the twenty-firſt Paragraph of the 31 *H.* 8. *c.* 13. with the third Paragraph of the ſame Statute, that the Diſcharge extends to the Lands of Religious Houſes, "which thereafter ſhall happen to be diſſolved, ſuppreſſed, re-"nounced, relinquiſhed, forfeited, given up *or by any other Means come to* "*the King's Highneſs*:" But the Conſtruction in one of the Caſes was, that the

the Words, *or by any other Means come to the King's Highneſs*, do not include a Coming by Act of Parliament; for if the Legiſlature had intended to include a Coming to the King by Act of Parliament, this, which is the higheſt Way of Coming, would have been mentioned before the Coming by Diſſolution, or by the other inferior Ways which are therein particularly mentioned. And in Support of this Conſtruction a Caſe was relied on, in which it had been holden, that Biſhops are not included under theſe Words of the 13 *Eliz. c.* 10. "Colleges, Deans and Chapters, "Parſons, Vicars and others having Eccleſiaſtical Livings:" Becauſe as Perſons of an inferior Rank are expreſsly mentioned, Biſhops, if it had been intended to include them, would have been likewiſe expreſsly mentioned.

22. But it has been holden in a ſubſequent Caſe, by three Judges againſt one, that Lands, heretofore diſcharged by Order of the Payment of Tithes *quamdiu propriis manibus excoluntur*, which were veſted in the Crown by the 32 *H.* 8. *c.* 24. are at this Day diſcharged of the Payment of Tithes: For that the Words in the third Paragraph of the 31 *H.* 8. *c.* 13. *which thereafter ſhall happen to be diſſolved*, do include every Kind of Diſſolution, and conſequently a Diſſolution by Act of Parliament; and that the Words, *or by any other Means come to the King's Highneſs*, do as well include a Coming by Act of Parliament as a Coming by any other Way. 1 Jon. 187. Whitton *v.* Weſton, Trin. 4 Car. 1.

23. And in a ſtill later Caſe it is ſaid, that, although there may have been formerly a Difference of Opinion as to this Point, it is now ſettled, that the Diſcharging-Clauſe of the 31 *H.* 8. *c.* 13. does extend to Lands veſted in the Crown by the 32 *H.* 8. *c.* 24. Freem. 299. Star *v.* Elliot, Mich. 31 Car. 2.

(X) Of a Diſcharge of the Payment of Tithes by Unity of Poſſeſſion.

1. SO long as Land in a Pariſh was in the Poſſeſſion of an Abbot, who was alſo poſſeſſed of the Rectory of the Pariſh, the Payment of Tithes for the Land was neceſſarily ſuſpended; becauſe the Abbot could not pay Tithes to himſelf. 2 Rep. 47, 48. The Archbiſhop of Canterbury's Caſe.

2. But the Land was not diſcharged of Tithes by the Unity of Poſſeſſion; becauſe Tithes do not iſſue out of Land but are collateral thereto. 11 Rep. 14. Priddle *v.* Napper.

2 Rep. 47, 49. Cro. Ja. 454. Com. 503.

3. And conſequently ſo ſoon as the Poſſeſſion of the Land was ſevered from that of the Rectory, the Land became again liable to the Payment of Tithes. Com. 511. Fox *v.* Bardwell.

2 Rep. 47, 49. Cro. Ja. 454. 11 Rep. 14.

4. Nay it has been holden, that, although there had been, previouſly to the Diſſolution of the Religious Houſe, a perpetual Unity of Poſſeſſion of the Land and the Rectory in the Abbot and his Predeceſſors, this is not an abſolute Diſcharge of the Tithes of the Land; inaſmuch as the Words of the Diſcharging-Clauſe in the 31 *H.* 8. *c.* 3. are not *diſcharged of Tithes*, but *diſcharged of the Payment of Tithes*. 2 Rep. 47. The Archbiſhop of Canterbury's Caſe. Hob. 298.

5. Great

11 Rep. 13, 14. Priddle v. Napper. 2 Rep. 48. Hob. 298, 311. Cro. Eliz. 578.

5. Great Doubt was formerly entertained, whether a perpetual Unity of Poſſeſſion of Land and the Rectory of the ſame Pariſh is *prima facie* a Diſcharge of the Tithes of the Land, within the Meaning of the Diſcharging-Clauſe in the 31 *H.* 8. *c.* 13.

2 Rep. 48. The Archbiſhop of Canterbury's Caſe, 11 Rep. 13, 14. Hob. 298, 311. Cro. Eliz. 578.

6. But it was at Length determined, that if the Land and the Rectory had been in the Poſſeſſion of the Abbot and his Predeceſſors for Time immemorial, and was ſo at the Diſſolution of the Monaſtery, and it do not appear that Tithes had ever been paid for the ſame, ſuch Land is *prima facie* diſcharged of Tithes by the 31 *H.* 8. *c.* 13. The Reaſon given for this Determination is, that, as it would be very difficult if not impoſſible to ſhew at ſo great a Diſtance of Time, in what Manner the Land was at firſt diſcharged of Tithes, it ſhall be intended, that it was diſcharged by Grant; in which Caſe the Diſcharge runs with the Land.

Hob. 298. Slade v. Drake, 2 Rep. 48. 11 Rep. 14. Hob. 311. Cro. Ja. 454. Comb. 511.

7. If it appear however, that a Farmer of the Land had at any Time before the Diſſolution of the Monaſtery paid Tithes for the ſame, this deſtroys the Preſumption ariſing from the perpetual Unity of Poſſeſſion; and is Evidence, that, although the Payment of Tithes was ſuſpended by Reaſon of the Unity of Poſſeſſion, the Land was not diſcharged thereof by Grant.

Ante, p. 90.

8. It has already been obſerved, that Lands, heretofore diſcharged by Order of the Payment of Tithes *quamdiu propriis manibus excoluntur*, which were veſted in the Crown by the 27 *H.* 8. *c.* 28. are not diſcharged of the Payment of Tithes by the 31 *H.* 8. *c.* 13.

9. It is ſufficient in this Place to ſay, that Land which was veſted in the Crown by the former of theſe Statutes, is not by the latter abſolutely diſcharged of the Payment of Tithes; notwithſtanding there had been a perpetual Unity of Poſſeſſion of the Land and the Rectory of the ſame Pariſh in the Abbot and his Predeceſſors.

2 Rep. 46. Cro. Ja. 58.

10. It has been determined in two Caſes, that Land, which was veſted in the Crown by the 32 *H.* 8. *c.* 24. is not diſcharged of Tithes by the 31 *H.* 8. *c.* 13. although there had been, before the Diſſolution of the Monaſtery to which the Land belonged, a perpetual Unity of Poſſeſſion of the Land and the Rectory of the ſame Pariſh in the Abbot and his Predeceſſors; and it do not appear that any Tithes have ever been paid for the ſame.

Ante, p. 90.

11. As the Reaſons upon which theſe Determinations were founded have been already mentioned, it is not neceſſary to repeat them.

Ante, p. 91.

12. But, as has already been obſerved, the Determinations in two ſubſequent Caſes have been, that the Diſcharging-Clauſe of the 31 *H.* 8. *c.* 31. does extend to Lands, which were veſted in the Crown by the 32 *H.* 8. *c.* 24.

2 Rep. 48, 49. The Archbiſhop of Canterbury's Caſe. Cro. Eliz. 511.

13. It has been holden, that, although there had been a perpetual Unity of Poſſeſſion of Land and the Rectory of the ſame Pariſh in a Dean and Chapter and their Predeceſſors, or in any other Corporation which was not Religious as well as Eccleſiaſtical, and it do not appear, that any Tithes have ever been paid for the Land, it is not abſolutely diſcharged of Tithes by the 31 *H.* 8. *c.* 13. For that, whenever the Houſes diſſolved or to be diſſolved are mentioned in that Statute, they are always called *Religious and Eccleſiaſtical Houſes*. The Diſcharging-Clauſe in the twenty-firſt Paragraph of that Statute does indeed ſay, that the Lands of the Houſes diſſolved and to be diſſolved ſhall be holden and enjoyed "diſcharged of the Payment of "Tithes, as freely and in as ample a Manner as the late Abbots, Priors, "Abbeſſes and other Eccleſiaſtical Governors and Governeſſes, or any of "them, had, held, occupied, poſſeſſed or enjoyed the ſame or any Parcel "thereof:"

" thereof:" But the Conſtruction has been, that no Houſes except ſuch as were Religious as well as Eccleſiaſtical had been diſſolved, theſe Words *Eccleſiaſtical Governors* do only mean Governors of Houſes which were Religious as well as Eccleſiaſtical.

(Y) Of Agreements and Leaſes concerning Tithes.

1. IT ſeems to be ſettled, that if a Parol Agreement be made for Tithes, by Way of Sale thereof for a Term of Years, or for the Life of the Parſon, in Caſe he ſo long continue to be Parſon, the Agreement is binding. Bro. contr. pl. 13. Yelv. 94. 1 Brownl 98. Palm. 377. Godb. 354. 8 Mod. 62.

2. But the Law does not ſeem to be ſettled, as to the Validity of a Parol Agreement for Tithes, by Way of Retainer thereof.

3. It is laid down in ſome Books, that a Parol Agreements for Tithes, by Way of Retainer thereof, for a Term of Years is good. Yelv. 95. Noy 121. 2 Brownl. 11. 3 Leon 247. Hetl. 128.

4. In other Books it is laid down, that if a Parol Agreement, be made for the retaining of Tithes during the Life of the Parſon, in Caſe he ſo long continue to be Parſon, the Agreement is good. Cro. Ja. 669. Honeycomb *v.* Sweet. 1 Lev. 24.

5. But it ſeems to be the better Opinion, that ſuch an Agreement, either for Years, or during the Life of the Parſon, in caſe he ſo long continue to be Parſon, is not good.

6. It is in divers Books laid down, that ſuch an Agreement is not good for more than one Year; becauſe it is in the Nature of a Leaſe of Tithes, which is not good unleſs it be by Deed. Noy 28. 1 Brownl. 98. Owen 103. 1 Rol. Rep. 174. Godb. 354. Cro. Eliz. 249. Cro. Ja. 137, 360. Hard. 203.

7. And in one of theſe it is ſaid expreſsly, that ſuch an Agreement is only good, even for one Year, becauſe it is *quaſi* a Sale of the Tithes. Cro. Ja. 137. Hawkes *v.* Brayfield.

8. And in a modern Caſe, two out of three of the Barons of the Exchequer were of Opinion, that a Parol Agreement, by Way of Retainer of Tithes, can only be good for one Year. Bunb. 2. Keddington *v.* Bridgman, Hil. 2 Geo. 1.

9. If a Parſon, who has made a Parol Agreement, by Way of Retainer of Tithes, for a Term of Years, or for the Term of his Life, in Caſe he ſo long continue to be Parſon, afterwards bring an Action upon the Statute for Subtraction of Tithes, without having firſt given Notice of his Diſſent to the Agreement, the Pariſhioner, although the Agreement be not binding, ſhall not be liable to the Penalties of the Statute, nor to Coſts. Hardr. 203. Bramer *v.* Thornton.

10. And Notice of his Diſſent is not good, unleſs it be given before the Land, of which he means to take Tithes in Kind, is manured and ſown: Becauſe perhaps the Land would not, if an earlier Notice had been given, have been manured and ſown. Ibid.

11. If

2 Leon. 73. Wellock's Caſe. Cro. Eliz. 249. Godb. 273.

11. If a Parol Agreement, by Way of Retainer of Tithes, be made by a Parſon, and he refuſe to abide thereby, the Pariſhioner, although the Agreement be not binding as to the Tithes, may maintain an Action againſt the Parſon for Non-performance of the Agreement.

Cro. Eliz. 249. Nelſon *v.* Woodward.

12. But if a Parol Agreement for Years be made with *A.* that he and his Aſſigns ſhall retain the Tithes of certain Land, and the Land be afterwards aſſigned over to *B. B.* cannot maintain an Action for Non-performance of the Agreement; inaſmuch as the Benefit of a Parol Agreement cannot be aſſigned.

2 Show. 307. Eaton *v.* Sherwin.

13. On the other Hand, if a Pariſhioner refuſe to pay the Money due upon a Parol Agreement, by Way of Retainer of Tithes, the Parſon, although the Agreement be not binding as to the Tithes, may maintain an Action for the Money agreed for.

Latch 176. Beliamy *v.* Balthrop. 2 Brownl. 11, 17.

14. It is laid down in ſome Caſes, that a Leaſe of Tithes by Parol is not good; becauſe Tithes, which lie in Grant, cannot paſs without Deed.

Cro. Eliz. 249. Godb. 354, 374. Freem. 234.

15. In other Caſes it is laid down, that a Leaſe by Parol of Tithes is good for one Year; becauſe the Leaſe enures *quaſi* a Sale of the Tithes.

16. But the Doctrine of the former Caſes is adhered to in two modern Caſes.

Bunb. 2. Keddington *v.* Bridgman, Hil. 2 Geo. 1.

17. In one of theſe it was holden, that a Leaſe by Parol of Tithes, even for one Year, is not good.

8 Mod. 63. The King *v.* Fairclough, Mich. 8 Geo. 1.

18. In the other it is laid down, that Tithes, which lie in Grant, cannot paſs without Deed.

Yelv. 131. Edmonds *v.* Booth.

19. A Leaſe of Tithes, to commence at a future Day is void; for, although the Tithes are not Parcel of but collateral to the Land, the ſame Rules are to be obſerved in Leaſes of Tithes as in Leaſes of Land.

(Z) Of a Suit in a Spiritual Court for Subtraction of Tithe.

Bro. Diſm. pl. 1. pl. 5. pl. 6. pl. 10. 2 Rep. 44. Vaugh. 195.

1. AT the Common Law there was no other Remedy againſt a Perſon who had neglected to ſet out or pay his Tithe, than by Suit in a Spiritual Court.

Bro. Diſm. Noy 44. 2 Bulſtr. 184. Cro. Eliz. 607.

2. If Tithe, which had been ſevered by a proper Perſon from the nine Parts, were afterwards carried away by a Stranger, the Pariſhioner was not anſwerable for it: But the Remedy, againſt the Perſon carrying it away, was by an Action in a Temporal Court; for by the Severance it was veſted in the Parſon, and become Lay Chattel.

3 Bulſtr 337. Mountford *v.* Sidley. Latch 8.

3. But if the Severance of the Tithe were by a Stranger, who had no Colour of Title to the Land upon which it aroſe, this did not take away the Right of the Parſon to ſue the Pariſhioner in a Spiritual Court for Subtraction

traction of Tithe; becauſe there was not ſuch a Property in the Tithe veſted in the Parſon, by this Severance, as would have enabled him to maintain an Action at Law, againſt the Perſon who ſhould afterwards carry it away.

4. By the 32 *H.* 8. *c.* 7. *par.* 2. it is enacted, "That in Caſe any Perſon "ſhall detain and with-hold any Tithe, the Party, having Cauſe to de- "mand or have the ſame, may ſue for the ſame in a Spiritual Court."

5. The Conſtruction of this Clauſe has been, that if the Perſon, who has legally ſet out Tithe, do afterwards carry it away, the Party to whom the Tithe was due may ſue for it in a Spiritual as well as in a Temporal Court; for that the Words *detain and with-hold* do fairly extend to a Carrying away of Tithe after it has been ſet out. Cro. Eliz. 607. Leigh *v.* Wood.

6. But it was in the ſame Caſe holden, that this Clauſe does not give Juriſdiction to any Spiritual Court, where Tithe, which has been legally ſet out by a proper Perſon, is afterwards carried away by a Stranger. Ibid.

7. If any Doubt did remain, as to the carrying away of Tithes, by the Perſon who had legally ſet it out, this is, as to predial Tithes, entirely removed by the 2 & 3 *Ed.* 6. *c.* 13 *par.* 2. it being thereby enacted, "That "if any Perſon do willingly withdraw his Tithe of Corn or Hay, or of ſuch "other Things whereof predial Tithes ought to be paid, by Reaſon whereof "the ſaid Tithe is loſt, impaired or hurt; that then, upon due Proof thereof "made before the Spiritual Judge, or any other Judge to whom hereto- "fore he might have made Complaint, the Party ſo withdrawing ſhall "pay the double Value of the Tithe ſo withdrawn, over and above the "Coſts, Charges and Expences of the Suit: The ſame to be recovered "before the Eccleſiaſtical Judge, according to the King's Eccleſiaſtical "Laws."

8. The Conſtruction of this Clauſe has been, that if a Stranger carry away the Tithe, after it has been legally ſevered from the nine Parts, an Action upon the Statute does not lie againſt the Stranger. Noy 44. Webb *v.* Potts.

9. By the 2 & 3 *Ed.* 6. *c.* 13. *par.* 2. A Juriſdiction is given to Spiritual Courts in certain new Caſes, it being thereby enacted, "That if any "Perſon does ſtop or let the Parſon, Vicar, Proprietor, Owner, or other "their Deputies or Farmers, to view and ſee all Manner of their predial "Tithes to be juſtly and truly ſet forth, and ſevered from the nine Parts, "and the ſame quietly to take and carry away, by Reaſon whereof the "ſaid Tithe is loſt, impaired or hurt; that then upon due Proof thereof "made before the Spiritual Judge, or any other Judge to whom here- "tofore he might have made Complaint, the Party ſo withdrawing ſhall "pay the double Value of the Tithe ſo loſt, impaired or hurt, over and "above the Coſts, and Expences of the Suit: The ſame to be recovered "before the Eccleſiaſtical Judge, according to the King's Eccleſiaſtical "Laws."

10. Only Spiritual Perſons could, at the Common Law, ſue in a Spiritual Court for Subtraction of Tithe. Bro. Diſm. pl. 9. 2 Inſt 648. 2 Rep. 44. Cro. Eliz. 512.

11. But as Laymen, ſoon after the Diſſolution of Monaſteries, became poſſeſſed of Eſtates in Tithes, it was neceſſary, that they ſhould be enabled to ſue for Subtraction thereof.

12. For the Sake of enabling them to do this, it is by the 32 *H.* 8. *c.* 7. *par.* 2. enacted, "That in Caſe any Perſon ſhall detain and with-hold any "Tithe, the Party being Eccleſiaſtical or Lay Perſon, having Cauſe to de- "made or have the ſaid Tithe, ſhall and may convene the Perſon ſo of- "fending before the Ordinary, his Commiſſary, or other competent "Miniſter

" Miniſter or lawful Judge, of the Place where ſuch Wrong ſhall be done, " according to the Eccleſiaſtical Laws; and in every ſuch Cauſe or Matter " of Suit the ſame Ordinary, Commiſſary, or other competent Miniſter or " lawful Judge, ſhall and may, by Virtue of this Act, proceed to the Ex- " amination, Hearing and Determination, of every ſuch Cauſe or Matter, " according to the Courſe and Proceſs of the Eccleſiaſtical Laws; and " thereupon may give Sentence accordingly."

12 Mod. 252. Machin v. Malton. 13. It was heretofore uſual, to cite Perſons from all Parts of *England*, to anſwer for Subtraction of Tithe in the Prerogative Courts of *Canterbury* and *York*.

14. In order to put a Stop to this great Vexation, it is by the 23 *H.* 8. *c.* 9. *par.* 2. enacted, " That no Perſon ſhall be from henceforth cited, ſum- " moned or otherways called, to appear before any Ordinary, or other Spi- " ritual Judge, out of the Dioceſe or peculiar Juriſdiction, wherein the Per- " ſon, who ſhall be cited, ſummoned or otherwiſe called, ſhall be inhabit- " ing, at the Time of the awarding or going forth of the ſame Citation " or Summons," except in certain Caſes mentioned in this Statute, of which Subtraction of Tithes is not one.

15. It is moreover enacted, by the 32 *H.* 8. *c.* 7. *par.* 2. " That every " Suit for Subtraction of Tithe ſhall be brought in the Court of the Or- " dinary, Commiſſary, or other competent Miniſter or lawful Judge, of " the Place where the Wrong ſhall be done."

16. It has been holden, that the Direction of the latter Statute is to be followed, as to the Spiritual Court in which a Suit for Subtraction of Tithe is to be inſtituted.

2 Mod. 352. Machin v. Malton. 17. A Perſon, who lived in the Dioceſe of *A.* had ſubtracted Tithe in the Dioceſe of *B.* Being cited to anſwer for this in the Court of the Biſhop of *B.* a Prohibition was moved for; and it was inſiſted, that by Virtue of the 23 *H.* 8. *c.* 9. every Citation for Subtraction of Tithe muſt be to a Court belonging to the Juriſdiction in which the Perſon cited lives. The Court being doubtful, a Prohibition was for the Sake of having the Point ſettled granted; but afterwards the whole Court were upon Deliberation of Opinion, that a Conſultation ought to be awarded.

2 Inſt. 651. 18. At the Common Law only the Tithe, or the Value thereof, with Coſts of the Suit, could be recovered in a Suit for Subtraction of Tithe.

19. But a better Remedy is given by the 2 & 3 *Ed* 6. *c.* 13. *par.* 2. in the Caſe of predial Tithes; it being thereby enacted, " That if any Perſon " do carry away his Corn, Hay or other Things of which predial Tithes " are due, before the Tithe thereof be ſet forth; or do willingly withdraw " any of his ſaid predial Tithes; or do ſtop or let the Parſon, Vicar, Pro- " prietor, Owner or other their Deputies or Farmers, to view and ſee all " Manner of their predial Tithes to be juſtly and truly ſet forth, and ſe- " vered from the nine Parts, and the ſame quietly to take and carry away, " by Reaſon whereof the ſaid Tithe is loſt, impaired or hurt; that then " the Party ſo carrying away, withdrawing, ſtopping or letting, ſhall pay " the double Value of the Tithe ſo taken, loſt, withdrawn or carried away, " over and above the Coſts, Charges and Expences of the Suit: The " ſame to be recovered according to the King's Eccleſiaſtical Laws."

2 Inſt. 651. 20. It is laid down, that the double Value, which may be recovered under this Statute in a Spiritual Court, is to be over and above the Value of the Tithe; and conſequently that a Suit in a Spiritual Court for Subtraction of predial Tithe is more advantageous than an Action upon the Statute in a Temporal Court for the treble Value; inaſmuch as the treble Value of the Tithes may be recovered in the Spiritual Court, together with the Coſts of the Suit.

21. But

21. But it ſeems to be the better Opinion, that only the double Value of the Tithe and the Coſts of the Suit can be recovered, in a Suit in a Spiritual Court for Subtraction of a predial Tithe.

22. In a Suit in a Spiritual Court for Subtraction of Tithe the Sentence was, that the Plaintiff, beſides the double Value of the Tithe and the Coſts of the Suit, ſhould alſo recover the ſingle Value thereof. A Prohibition was awarded. And by the Court—The Spiritual Court is not impowered by the 2 & 3 *E.* 6. *c.* 13. to give more than the double Value of the Tithe and the Coſts of the Suit, in a Suit for Subtraction of Tithe. Codb. 245. Baldwin *v.* Geery.

23. If the Defendant die, pending a Suit upon the 2 *Ed.* 6. *c.* 13. in a Spiritual Court for Subtraction of Tithe, and afterwards another Suit be commenced againſt his Executor, a Prohibition lies; for the double Value, given by that Statute, is given by Way of Puniſhment for the perſonal Wrong in ſubtracting the Tithe; and an Executor is not anſwerable for a perſonal Wrong done by his Teſtator. Sid. 181. Weekes *v.* Truſſel.

24. It is in the general true, that there is no Method of inforcing Obedience to a Sentence of a Spiritual Court by Fine, Impriſonment or Amercement. 4 Inſt. 324. 11 Rep. 44.

25. But by the 32 *H.* 8. *c.* 7. *par.* 4. it is enacted, "That if any Perſon, after a definitive Sentence given againſt him in an Eccleſiaſtical Court for Subtraction of Tithe, obſtinately and wilfully refuſe to pay his Tithe, or ſuch Sums of Money wherein he ſhall be condemned for the ſame, that then two Juſtices of the Peace ſhall have Authority by this Act, upon Information, Certificate or Complaint to them made in Writing, by the Eccleſiaſtical Court that gave the ſame Sentence, to cauſe the Party ſo refuſing to be committed to the next Gaol, and there to remain without Bail or Mainprize, until he ſhall have found ſufficient Sureties, to be bound in Recognizance or otherwiſe before the ſame Juſtices, to the Uſe of our Sovereign Lord the King, to perform the ſaid Sentence."

(Aa) In what Caſes a Prohibition lies to a Suit in a Spiritual Court for Subtraction of Tithe.

1. NOtwithſtanding the general Juriſdiction which Spiritual Courts have in the Matter of Tithes, a Prohibition does in many Caſes lie to a Suit in a Spiritual Court for Subtraction of Tithe.

2. But it is ſometimes difficult to determine, whether a Prohibition does or does not lie to ſuch Suit.

3. It is a Rule of Law, that Queſtions concerning Temporal Matters are only to be tried in Temporal Courts. Fitz. N. B. 40. 2 Inſt. 613. Cro. Eliz. 228. 2 Roll. Abr. 291.

4. But there is another Rule of Law, that *Ubi cognitio principalis eſt ibi debet eſſe cognitio acceſſorii.* 2 Inſt. 493. Hob. 188. Sid. 81, 161. Cro. Ja. 269. Salk. 547.

5. A Deſire of reconciling theſe two Rules of Law, together with the Difficulty of doing it, has been productive of Determinations, which are not eaſily to be reconciled.

6. As

6. As ſome of theſe Determinations are founded upon nice Diſtinctions, the Law, concerning the awarding of a Prohibition to a Suit in a Spiritual Court for Subtraction of Tithe, will be much better collected from ſubmitting the principal Caſes to the Readers Judgment, than from any general Rules which can be laid down.

Cro. Eliz. 666. Mallory v. Mariot.

7. If Payment be pleaded to a Libel in a Spiritual Court for Subtraction of Tithe, a Prohibition does not lie; becauſe the Queſtion, whether there was ſuch Payment, is ſuch an incidental one as may be well tried in the Spiritual Court.

Ld. Raym. 835. Dike v. Brown.

8. If to a Libel in a Spiritual Court for Subtraction of Tithe of Wood there be a Plea of groſs Wood, a Prohibition does not lie; for the Queſtion, whether the Wood of which the Tithe is demanded be groſs Wood, may be well tried in the Spiritual Court.

Ld. Raym. 74. Chamberlain v. Hewitſon.

9. If the Validity of Letters Patent, or of a Feoffment or Releaſe, come in Queſtion in a Suit in a Spiritual Court for Subtraction of Tithe, a Prohibition does not lie; becauſe the Validity of either of theſe may be well tried in the Spiritual Court.

Hob 247. Latch 125. 2 Lev. 103. Bunb. 8.

10. If a Suit be in a Spiritual Court for Subtraction of Tithe due by Cuſtom, a Prohibition does not lie; for Tithe due by Cuſtom may as well be ſued for in a Spiritual Court, as Tithe which is due of Common Right.

Hob. 42, 247. 1 Ventr 274. Bunb. 8.

11. A Suit may be in a Spiritual Court, for that which is to be paid as a *Modus*: For as the Tithe, in lieu of which it is to be paid, is ſo abſolutely diſcharged, that the Parſon cannot reſort to the taking thereof in Kind, the *Modus* becomes a Spiritual Fee, and conſequently it is recoverable in a Spiritual Court.

12 Mod. 416. Johnſon v. Ryſon.

12. Nay it is ſaid in one Caſe, that a Suit, for that which is to be paid as a *Modus*, can only be inſtituted in a Spiritual Court.

2 Rep. 45. The Archbiſhop of Canterbury's Caſe. Cro. Eliz. 511.

13. It was heretofore holden, that a Prohibition would lie to a Suit in a Spiritual Court for Subtraction of Tithe, upon the bare Suggeſtion of a cuſtomary Method of Tithing, or of a *Modus*; although the cuſtomary Method of Tithing, or the *Modus*, had not been pleaded in the Spiritual Court.

Ld. Raym. 835. Dike v. Brown. Salk. 655.

14. It has been ſince holden, that a Prohibition does not lie in ſuch Caſe, unleſs the Cauſe ſuggeſted for obtaining the Prohibition has been pleaded in the Spiritual Court; for that, as the Court has a general Juriſdiction in the Matter of Tithes, the *Modus*, by which it is to be deprived of that Juriſdiction, muſt be pleaded ſpecially.

Bunb. 176. Blackett v. Finny.

15. But if a Bill be filed in a Court of Equity to eſtabliſh a *Modus*, and it appear, that a Suit is inſtituted in a Spiritual Court for Subtraction of the Tithe, for which the *Modus* is alledged to be a Recompence, an Injunction is uſually granted; although the Modus have not been pleaded.

Bunb. 17. Offley v. Whitehall. Hob. 247. 1 Ventr. 165, 274. 1 Sid. 283.

16. If a cuſtomary Method of ſetting out Tithe, or a *Modus*, be pleaded to a Suit in a Spiritual Court for Subtraction of Tithe, a Prohibition does not lie: Unleſs the Spiritual Court have refuſed to admit the Plea, or the Truth thereof be denied. Bunb. 8.

12 Mod. 206. Hill v. Vaux. Salk. 656.

17. But if the cuſtomary Method of ſetting out Tithe, or the *Modus*, which is pleaded to a Suit in a Spiritual Court for Subtraction of Tithe, appear plainly to be bad, a Prohibition does not lie; although the Truth of the Plea be denied: For it would be quite nugatory to award a Prohibition, in order to try the Exiſtence of a Thing, which if it do exiſt is bad.

18. It

18. It is in the general true, that if the Exiſtence of a cuſtomary Method of ſetting out Tithe, or the Validity of a *Modus*, come in Queſtion in a Suit in a Spiritual Court for Subtraction of Tithe, a Prohibition lies; becauſe the Exiſtence of the Cuſtom or the Validity of the *Modus* cannot be well tried in ſuch Court. The Reaſon is, that in ſome Caſes an Uſage of ten Years, in others an Uſage of twenty Years, in others an Uſage of thirty Years, and in all an Uſage of forty Years, does by the Eccleſiaſtical Law make a Cuſtom; whereas there cannot be a cuſtomary Method of ſetting out Tithe or a valid *Modus*, unleſs the Tithe has Time immemorially been ſet out in the Method preſcribed for, or the *Modus* has been paid Time immemorially. 2 Inſt 643. Hob. 247. Latch 48. Cro. Ja. 454. 1 Ventr. 274. 2 Lev. 103. Ld. Raym. 436. Bunb. 8, 17.

19. If after a Prohibition have been awarded, Iſſue be taken upon the Exiſtence of cuſtomary Method of ſetting out Tithe, or the Validity of a *Modus*, which has been pleaded in the Spiritual Court, and the Verdict in Prohibition be, that there is not ſuch a cuſtomary Method of ſetting out Tithe, or ſuch a *Modus*, a Conſultation ought to be awarded; inaſmuch as the Reaſon of tying up the Hands of the Spiritual Court does no longer exiſt. Hob. 192, 247. Godb. 245. Cro. Car. 113. 2 Lev. 103. Hardr. 510.

20. But if the Verdict in Prohibition find the cuſtomary Method of letting out Tithe, which has been pleaded in the Spiritual Court, to be good in Part, a Conſultation ought not to be awarded; becauſe, as the Cuſtom is in Part good, the Suit ought not to proceed in the Spiritual Court. Hob. 192. Berrie's Caſe.

21. If one *Modus* be ſuggeſted as a Cauſe of Prohibition, and a Verdict in Prohibition find a different *Modus*, a Conſultation ought not to be awarded; becauſe the Validity of the *Modus*, which is found, cannot be well tried in the Spiritual Court. Cro. Eliz. 736. Auſtin *v.* Pigot. Hetl. 100.

22. If the Bounds of a Pariſh come in Queſtion in a Suit in a Spiritual Court for Subtraction of Tithe, a Prohibition lies. 2 Roll. Abr. 282. E. pl. 3. 1 Ventr. 335. 1 Lev. 78.

23. But it is ſaid, that although a Spiritual Court cannot try the Bounds of a Pariſh, the Bounds of a Vill in a Pariſh may be tried in ſuch Court. 1 Sid. 89. 1 Lev. 89.

24. And in one Caſe it is laid down, that a Spiritual Court can try the Bounds of a Vill in a Pariſh. 2 Roll. Abr. 312. pl. 7. Ives *v.* Wright.

25. But if the Reaſon of the Determination in this Caſe, which is, that the Diſpute was between two Spiritual Perſons, be attended to, it by no Means follows, that the Bounds of a Vill in a Pariſh can in the general be tried in a Spiritual Court.

26. If the Right of carrying away Tithe, by a particular Way, come in Queſtion in a Suit in a Spiritual Court for Subtraction of Tithe, a Prohibition lies; becauſe a Right of Way does generally depend upon Uſage. 1 Bulſtr. 68. Anon.

27. Wherever a Spiritual Court does try a Temporal Matter, which is incidental to a Queſtion concerning Subtraction of Tithe, the Temporal Matter muſt be tried according to the Rules of the Common Law; otherwiſe a Prohibition lies. Hob. 188. 1 Ventr. 291. 2 Lev. 64. Salk. 547. Ld. Raym. 74.

28. If a Party, who has pleaded Payment to a Suit in a Spiritual Court for Subtraction of Tithe, offer to prove this by one Witneſs, and the Proof be not admitted, a Prohibition lies; for, although two Witneſſes are neceſſary by the Eccleſiaſtical Law in every Caſe, the Common Law requires but one in this Caſe. Cro. Eliz. 666. Mallory *v.* Mariot.

29. But if a Spiritual Court do in ſuch Caſe admit Proof by one Witneſs to be ſufficient, that Court is to judge by its own Rules of the Competency of the Perſon adduced as a Witneſs. Salk. 547. Shotter *v.* Friend.

30. It is laid down generally in ſome Books, that a Prohibition lies to a Suit in a Spiritual Court for Subtraction of Tithe after Sentence. Salk. 547. Ld. Raym. 835.

Salk. 548. Bunb. 17.

31. In other Books it is laid down, that although a Prohibition does lie after Sentence, in a Caſe wherein the Spiritual Court had not Juriſdiction in the principal Matter, none lies to a Suit for the Subtraction of Tithe after Sentence: Becauſe, as the Spiritual Court had Juriſdiction in the principal Matter, the Defect can only have been of Juriſdiction to try ſome incidental Matter; in which Caſe a Prohibition does not lie after Sentence.

32. But if the Sentence of a Spiritual Court be illegal, a ſpecial Prohibition may be obtained to a Suit in a Spiritual Court for Subtraction of Tithe after Sentence.

Godb. 245. Baldwin v. Geery.

33. In a Suit upon the 2 *E.* 6. *c.* 13. for Subtraction of a predial Tithe, the Sentence of the Spiritual Court was, that the Plaintiff, beſides the double Value of the Tithe and the Coſts of the Suit, ſhould likewiſe recover the ſingle Value of the Tithe by Way of Damages. As a Spiritual Court is not impowered by that Statute, to give more than the double Value of the Tithe and the Coſts of the Suit, the Sentence was holden to be illegal; and a Special Prohibition was awarded.

(Bb) Of a Suit in a Court of Equity for Subtraction of Tithe.

1. THE Courts of Chancery and Exchequer have both Juriſdiction in the Caſe of Subtraction of Tithe.

Bunb. 28. Anon.

2. A Bill in Equity may be filed for Subtraction of Tithe, however ſmall the Value of the Tithe ſubtracted is.

Bunb. 115. Bailey v. Worrall. Bunb. 263.

3. If a Bill in Equity be filed for Subtraction of Tithe belonging to a Portion of Tithes, or of the Tithe of a particular Thing, every Perſon, intitled to any Tithe ariſing in the Pariſh in which the Tithe is claimed by the Bill, muſt be a Party thereto; becauſe the Right of every ſuch Perſon may be affected by the Decree.

Bunb. 192. Jones v. Barrett.

4. A Sequeſtrator cannot file a Bill in Equity, for Subtraction of Tithe during the Vacancy of the Benefice, without making the Biſhop of the Dioceſe a Party; becauſe the Sequeſtrator is accountable to the Biſhop for what he receives.

Bunb. 141. The Biſhop of London v. Nicholls.

5. If a Bill in Equity be filed by a Sequeſtrator, during the Inſanity of an Incumbent, for Subtraction of Tithe, the Incumbent or his Committee muſt be a Party to the Bill; otherwiſe, if the Incumbent ſhould recover his Senſes, and file another Bill for the ſame Tithe, a Recovery by the Sequeſtrator could not be pleaded in Bar to the ſecond Bill.

Bunb. 325. Charlton v. Charlton.

6. If a Rector or Impropriator file a Bill in Equity, for Subtraction of Tithe belonging to a Rectory, it is ſufficient to ſhew a Title to the Rectory; the Right of Tithe being incident to the Right of Rectory.

Bunb. 115. Penny v. Hooper.

7. But an Impropriator muſt in ſuch Bill ſhew that either himſelf, or the Perſon under whom he claims, has an Eſtate in Fee, in the Rectory.

Bunb. 296. Leigh v. Maudſley.

8. It is not however neceſſary for an Impropriator to derive his Title in ſuch Bill from the original Grant of the Rectory by the Crown; it being ſufficient to ſhew that he is ſeiſed thereof in Fee.

Cro. Eliz. 633. 2 Bulſtr. 27. Bunb. 7, 72, 269.

9 If a Vicar file a Bill in Equity for Subtraction of Tithe, he muſt ſhew himſelf intitled by Endowment or Augmentation to the Tithe claimed: Becauſe a Vicar can have no Right to Tithe, except by Endowment or Augmentation.

10. It

10. It is not however neceſſary, for a Vicar to ſet out in ſuch Bill the Deed by which his Vicarage was endowed or augmented with the Tithe claimed; for if he can ſhew, that he and his Predeceſſors have conſtantly received the Tithe, it ſhall be intended, that the Vicarage has been endowed or augmented therewith. 2 Bulſtr. 27. 2 Keb. 729. Hardr. 329. Bunb. 7, 169.

11. If a Bill be filed for Subtraction of Tithe belonging to a Portion of Tithes, the Plaintiff muſt not only ſhew a Title to the Tithe claimed; but he muſt likewiſe ſhew a Receipt of the Tithe by himſelf and thoſe under whom he claims. Bunb. 325. Charlton *v.* Charlton. Bunb. 262.

12. If the Defendant, in his Anſwer to a Bill in Equity for Subtraction of Tithe, admit the Plaintiff's Title to the Tithe claimed, and do only inſiſt upon being diſcharged of the Tithe, or of the Payment thereof, the Want of having ſet out a Title in the Bill is thereby cured. Bunb. 72. Pye *v.* Rea. Hardr. 130.

13. If a Bill in Equity be filed for Subtraction of a predial Tithe, without waiving the Penalty of the treble Value given by the Statute, a Demurrer lies; for a Court of Equity will never compel a Defendant to diſcover any Thing, by the Diſcovery of which he may become liable to a Penalty. 1 Vern. 60. Anon. Hard. 137, 190.

14. But if the Plaintiff in ſuch Bill only pray Relief as to the ſingle Value of the Tithe ſubtracted, it is not neceſſary to waive the Penalty. Bunb. 193. The Attorney-General *v.* Vincent.

15. A Bill in Equity having been filed for Subtraction of Tithe, the Defendant ſtood out till a Sequeſtration was granted; and the Bill was of Courſe taken *pro Confeſſo*. The Defendant afterwards moved for a Rule, that upon paying Coſts the Value of the Tithe might be aſcertained by the Taxation of the Maſter, or by the Oath of the Plaintiff. This was refuſed: But a Rule was made for the Plaintiff to ſhew Cauſe, why he ſhould not conſent to make Oath of what Value the Tithe was. Bunb. 26. Baily *v.* Peaſly.

16. If a Tender were made before the Bill in Equity for Subtraction of Tithe was filed, and a Tender be again made by the Anſwer, the Defendant is not liable to Coſts. Bunb. 28. Anon.

17. But if the Defendant did not make a Tender before the Bill was filed, he muſt, notwithſtanding he make a Tender by his Anſwer, account for the Tithe and pay Coſts, how ſmall ſoever the Value of the Tithe ſubtracted is. Ibid.

18. If a Bill be filed in the Court of Exchequer for Subtraction of Tithe, and the Defendant plead, that a *Modus* for the Tithe thereby claimed has, after directing an Iſſue, been eſtabliſhed by a Decree of the Court of Chancery, the Plea is good in Bar to the Bill in the Court of Exchequer. Bunb. 211. Geale *v.* Wintour.

19. A Plea of Non-reſidence is good in Bar to a Bill in Equity, brought by a Rector or Vicar for Subtraction of Tithe. Ibid.

20. But it muſt be ſhewn, that the Non reſidence was before the Time, in which the Tithe claimed by the Bill became due. Ibid.

21. The Statute of Limitations cannot be pleaded in Bar to a Bill in Equity for Subtraction of Tithe: Becauſe the Defendant is conſidered as a Bailiff or Receiver of the Plaintiff; and that Statute does not extend to Demands upon ſuch Perſons. Bunb. 213. Marſton *v.* Cleypole.

22. If a Bill in Equity be filed for Subtraction of Tithe due of common Right, the Defendant cannot avail himſelf of a Diſcharge of the Tithe, or of the Payment thereof, unleſs the Diſcharge be ſpecially pleaded. Bunb. 61. Jordan *v.* Colley.

23. A Diſcharge of the Tithe of one Thing, or of the Payment thereof, may be inſiſted upon, in an Anſwer to a Bill in Equity for Subtraction of Tithes of divers Things. Bunb. 297. Leigh. *v.* Maudſley.

24. But if the Defendant in his Anſwer inſiſt upon a Diſcharge of all Tithes, or of the Payment thereof, and prove only a Diſcharge of ſome Tithes, or of the Payment thereof, he cannot derive any Benefit from the Diſcharge proved. Ibid.

Bunb. 80. Tarton v. Clayton.

25. Divers *Moduſſes* for the Tithes of divers Things may be inſiſted upon in an Anſwer to a Bill in Equity for Subtraction of Tithes: But they muſt be pleaded ſeverally; for one *Modus* cannot be pleaded diſtributively for the Tithes of divers Things.

26. If a *Modus* be inſiſted upon in an Anſwer to a Bill in Equity for Subtraction of Tithe, the Day, upon which it is to be paid, ought to be ſet out.

Bunb. 105. Goddard v. Keeble, Paſch. 8 Geo. 1.

27. And in three modern Caſes the *Moduſſes* were diſallowed; becauſe the Days of paying them were not ſet out in the reſpective Anſwers. Pemberton v. Sparrow, Trin. 8 Geo. 1. Eloy v. Prior, Hil. 10 Geo. 1.

Bunb. 280. Woolſerſton v. Manwaring. Hil. 3 Geo. 2.

28. But in another modern Caſe, wherein a *Modus*, the Day of paying which was not ſet out, had upon an Iſſue directed been found for the Defendant, it was holden, that the Defect of having ſet this out was cured by the Verdict; and the *Modus* was eſtabliſhed.

Bunb. 328. Gibb v. Goodman, Trin. 7 G. 2.

29. In a ſtill later Caſe, the following Diſtinction was taken by *Reynolds* Chief Baron; namely, that the Want of having ſet out the Day, upon which a *Modus* is to be paid, in an Anſwer to a Bill in Equity for Subtraction of Tithe may be ſo ſupplied by Evidence, as to be a Foundation for the Court to direct an Iſſue to try whether there be the *Modus*, with Liberty to indorſe the Day of Payment upon the *Poſtea*: But that if a Bill in Equity be brought to eſtabliſh a *Modus*, the Day of paying it muſt be expreſsly ſet out.

Hardr. 4. The Attorney-General v. Straite.

30. It was holden in one Caſe, that it is incumbent upon the Plaintiff, to prove the Quantity and Value of the Tithe claimed by a Bill in Equity for Subtraction of Tithe.

Bunb. 60. Gumley v. Fontleroy.

31. But the Authority of this Caſe has been often denied; and it is now conſtantly holden, that the Defendant muſt in all Caſes, even where a *Modus* is pleaded, ſet out, in his Anſwer to a Bill in Equity for Subtraction of Tithe, the Quantity and Value of the Tithe claimed by the Bill; becauſe it frequently happens, that no Perſon except himſelf knows theſe Things.

2 Will. 463. Carleton v. Brightwell.

32. It was not heretofore the Practice of the Court of Exchequer to decree, that the Defendant ſhould account for Tithe, which became due after the filing of the Bill for Subtraction of Tithe.

Ibid.

33. But the Practice at that Time of the Court of Chancery was to decree, that an Account ſhould be taken of all Tithes due at the Time of making the Decree.

MS. Rep. Robinſon v. Bland, Mich. 1. Geo. 3.

34. And it was ſaid in a late Caſe in the Court of King's Bench by Lord *Mansfield* Chief Juſtice, that the Practice of the Court of Exchequer is at this Day the ſame as that of the Court of Chancery.

(Cc) Of a Suit in a Court of Equity to eſtabliſh a Modus, or a cuſtomary Manner of ſetting out Tithes.

1 Vern. 185. Neſſ. Ch. Rep. 10. 1 Chan. Ca. 187.

1. IT was formerly doubted, whether a Bill could be filed in a Court of Equity to eſtabliſh a *Modus* by Preſcription, or a cuſtomary Manner of ſetting out Tithes; and ſuch Bills have frequently been diſmiſſed.

2. But

2. But it is now the Practice of Courts of Equity to retain such Bill, which is in Reality no more, than a Bill to perpetuate the Testimony of Witnesses, as to the *Modus* or customary Manner of setting out Tithes. 1 Vern. 485. 1 Eq. Ca. Abr. 367. 2 Will. 565.

3. If a Bill in Equity be filed against the Lessee of a Rector, Vicar or Impropriator, to establish a *Modus*, the Rector, Vicar or Impropriator must be a Party; for a Court of Equity will never bind the Right of any Person, without giving him an Opportunity of being heard. Bunb. 70. Glanville *v.* Trelawney.

4. The Day on which the *Modus* is to be paid must be expresly set out in a Bill in Equity to establish a *Modus*. Bunb. 328. Club *v.* Goodman.

5. But if the setting out of the Day of Payment be omitted in a Bill to establish a *Modus*, the Court will give the Plaintiff Leave to amend his Bill, upon paying the Costs of the Day. Bunb. 199. Blackett *v.* Finny.

6. A Court of Equity does never establish a *Modus*, or a customary Manner of setting out Tithe, until the Validity thereof has been tried at Law; in Case a Party, whose Right may be thereby affected, desire to have it so tried. Sel. Ca. in Chan. 53. Webber *v.* Taylor.

7. If a Bill in Equity be filed to establish a *Modus*, and the *Modus* be not proved in the Manner it is set out in the Bill: Yet if the Defendant admit that there is a *Modus*, and the Difference betwixt him and the Plaintiff is only as to the Extent of the *Modus*, the Court will direct an Issue at Law to try how far it does extend, with Liberty to indorse the *Postea* as it may be necessary. Bunb. 340. Laithes *v.* Christian.

(Dd) Of an Action upon the Statute against Subtraction of Tithes.

1. AN Action lay at the Common Law for Tenths; because a Layman was at all Times capable of having Tenths. Bro. Dism. pl. 1. pl. 5. pl. 6. Cro. Eliz. 599. 763.

2. An Action also lay at the Common Law against the Person carrying away Tithe which had been legally severed; for by the Severance it became a Lay-Chattel. Bro. Dism. pl. 6. Cro. Eliz. 607. Latch 8. 3 Bulstr. 337.

3. But no Action lay at the Common Law for Subtraction of Tithe; the Remedy being only in Spiritual Courts. Bro. Dism. pl. 1. pl. 5. pl. 6. pl. 10. 2 Rep. 44. Vaugh. 195.

4. *Coke* Chief Justice was of Opinion, that a Power is given by the 32 *H.* 8. *c.* 7. to sue for Subtraction of Tithe in Temporal Courts. 1 Inst. 149.

5. But this is denied by *Vaughan* Chief Justice; and it appears, upon looking into this Statute, that the Power given to sue for Tithe in Temporal Courts, is only a Power to sue for an Estate in Tithe. Vaugh. 195. Holden *v.* Smallbroke.

6. Nay, so far from giving a Power to sue in Temporal Courts for Subtraction of Tithe, it is by *par.* 8. of this Statute expresly provided, "That it shall not extend to give any Remedy, Cause of Action, or Suit, "in the Temporal Courts, against any Person who shall refuse to set out "his Tithes, or who shall detain, with-hold or refuse to pay his Tithes."

7. By

7. By the 2 & 3 *Ed.* 6. *cap.* 13. *par.* 1. it is enacted, "That every of "the King's Subjects ſhall from henceforth truly and juſtly, without "Fraud or Guile, divide, ſet out, yield and pay, all Manner of their "predial Tithes in their proper Kind, as they riſe and happen, in ſuch "Manner and Form, as hath been of Right yielded and paid within forty "Years next before the making of this Act, or of Right or Cuſtom ought "to have been yielded or paid; and that no Perſon ſhall from henceforth "take and carry away any ſuch Tithes, which have been yielded or paid "within forty Years, or of Right ought to have been yielded or paid, in "the Place or Places titheable of the ſame, before he hath juſtly divided "or ſet forth for the Tithe thereof the tenth Part of the ſame, or other-"wiſe agreed for the ſame Tithe with the Parſon, Vicar, or other Owner, "Proprietor or Farmer of the ſame Tithes; under the Pain of Forfeiture "of the treble Value of the Tithes ſo taken or carried away."

2 Inſt. 650. 8 Rep. 119. Cro. Eliz. 621.

8. An Information *Qui tam* does not lie for the Forfeiture given by this Statute; becauſe no Part of the Forfeiture is given to the King.

Hetl. 121. Luvered *v.* Owen.

9. But it is ſaid that an Information *Qui tam* may be upon this Statute, if the Forfeiture be waived: For that the King would then be intitled to a Fine.

Cro. Eliz. 621. Johns *v.* Carne.

10. Although the Penalty given by the 2 & 3 *E.* 6. *c.* 13. be not a certain Sum of Money, it has been holden that an Action of Debt lies upon the Statute.

2 Bulſtr. 184. Moyle *v.* Ewer.

11. If the Owner of Corn, before the Corn is ſevered, grant it to a Stranger, with an Intent to defraud the Parſon of his Tithe, this is ſuch Fraud and Guile, that an Action upon the Statute will lie againſt the firſt Owner of the Corn.

2 Inſt. 649.

12. If a Man, who has fairly ſet out his Tithe, do in a ſhort Time after carry away the ſame, this is Fraud and Guile within the Meaning of the Statute.

Brownl. 65. Pain *v.* Nicols.

13. In an Action of Debt upon the Statute, the Plaintiff declared for the Subtraction of mixed Tithes, as well as predial ones, and had a Verdict as to the whole. It was inſiſted, that an Action does not lie upon the Statute for the Subtraction of any Tithes except predial ones; and the Judgment was arreſted.

14. An Action is not by the expreſs Words of the Statute given to a Farmer of Tithes.

Moor 915. Day *v.* Peckwell. Cro. Ja. 70.

15. But it has been holden, that as every Farmer of Tithes has a Right to the Tithes, the Remedy, given by the Statute, ought to be extended by Equity to every ſuch Farmer.

1 Ventr. 30. Moreton's Caſe. Sid 407. 1 Vern. 60.

16. An Executor may bring an Action upon the Statute for Subtraction of Tithe due to his Teſtator: This Caſe being within the Equity of the 4 *E.* 3. *c.* 7. by which an Action is given to an Executor for the Goods of his Teſtator, which were carried away during the Life of his Teſtator.

Sid. 181. Weekes *v.* Truſſel. Sid. 407.

17. An Action does not lie upon the Statute againſt an Executor: For the treble Value thereby given is by Way of Puniſhment for the Perſonal Wrong; and an Executor is not anſwerable for a Perſonal Wrong done by his Teſtator,

Comb. 361. Baſtard *v.* Hancock.

18. In an Action upon the Statute againſt *Hancock* and two others, the Defendants all joined in the Plea of *Nil debent.* The Verdict was, that *Hancock* owed eighteen Pounds: But that the other two owed Nothing. It was moved in Arreſt of Judgment, that the Action ought not to have been a joint Action: But after great Debate and Deliberation the Court were unanimouſly of Opinion, that the Action was well brought; for that, as it is founded upon a Tort and not upon a Contract, one of the Defendants may,

may, as is frequently done in other Actions founded upon Torts, be found guilty, and the others may be acquitted.

19. In an Action upon the Statute the Plaintiff declared, that the Defendant was Occupier of the Land, upon which the Tithe aroſe, from the tenth Day of *March* for the Space of ſix Months; that in the *Auguſt* following he cut the Corn growing thereupon; and that after the Expiration of his Term he carried away the Corn without having ſet out the tenth Part thereof. An Objection was taken, that it appeared from the Plaintiff's own ſhewing, that the Defendant was not Occupier of the Land at the Time of the ſuppoſed Subtraction of the Tithe: But it was holden, that as he was the Owner of the Corn at that Time, the Action was well brought. Cro. Ja. 324. Kipping v. Swaine.

20. It is not neceſſary for the Perſon, who brings an Action upon the Statute, to ſet out a Title to the Tithe in Queſtion: Becauſe as the Action is in the Nature of an Action of Treſpaſs founded upon a Tort, it is ſufficient to ſhew a Poſſeſſion of the Tithe in the Plaintiff. 2 Lev. 1. Cro. Ja. 68, 361, 437. 1 Ventr 126. 2 Bulſtr. 67.

21. If a certain Leaſe of the Tithe be declared upon in an Action upon the Statute, and the Jury find a different Leaſe, the Variance is not fatal: Becauſe the Allegation of the Leaſe is only Inducement to the Action; the Wrong in carrying away the Tithe being the Ground thereof. Cro. Ja. 328. Wheeler v. Haydon. 2 Bulſtr. 86.

22. It is neceſſary for the Perſon, who brings an Action upon the Statute, to ſhew, that the Defendant was one of the King's Subjects at the Time of ſubtracting the Tithe. Cro. Ja 324. Kipping v. Swaine.

23. But if it be alledged, that the Defendant was Occupier of the Land at the Time of ſubtracting the Tithe, it is well enough; becauſe it may be fairly inferred, that he was one of the King's Subjects at that Time. Hard. 173. Phillips v. Kettle.

24. The Declaration in an Action upon the Statute, muſt ſhew, that the Defendant had made no Agreement with the Plaintiff for the Tithe, before he carried it away; for the Statute has theſe Words, *or otherwiſe agreed for the ſame Tithe.* Carth. 304. Alſton v. Buſcough. Cro. Ja. 70.

25. In an Action upon the Statute, the Plaintiff declared for a certain Quantity of Grain. It was objected, that the Word Grain, which comprehends Seeds of divers Sorts, is of too general Signification, and that the particular Kind of Grain ought to have been alledged: But the Declaration was holden to be good; for that the Word Grain does in its uſual Signification mean Corn. Sty. 103, 108. Southcot v. Southcot.

26. It is ſufficient, in an Action upon the Statute, to alledge the Value of the whole Tithe ſubtracted, without ſhewing the Quantity or Value of the particular Kinds of Tithes. Cro. Ja. 438. Sanders v. Sanders.

27. The Plaintiff may recover, in an Action of Debt upon the Statute, notwithſtanding the Sum found by the Verdict be leſs than the Sum alledged in his Declaration to be due: For although it be in the general true, that the Plaintiff cannot recover in an Action of Debt a leſs Sum than he declares for, he may, as no certain Penalty is given by the Statute, recover in this Action the Value of the Tithes ſubtracted. Cro. Ja. 498. Pemberton v. Shelton.

28. The Statute of Limitations cannot be pleaded in Bar to an Action upon the Statute: Becauſe the Occupier is conſidered as a Bailiff or Receiver; and the Statute of Limitations is no Bar to a Demand upon ſuch Perſons. Cro. Car. 513. Talory v. Jackſon. Bunb. 213.

29. The more proper Plea in an Action of Debt upon the Statute is *Nil debet:* But it has been holden, that, as the Action is founded upon a Tort, Not guilty is a good Plea. 2 Inſt. 651. Moor 914. Carth. 361.

30. If a Defendant, againſt whom an Action upon the Statute is brought, would avail himſelf of a *Modus* by Deed, the Deed muſt be pleaded: And the Deed is pleadable, although the Date thereof be beyond Time of Memory, and it was not allowed in a Court of Eyre; for an Allowance before Juſtices in Eyre was not neceſſary in the Caſe of a private Deed. 2 Mod. 321, 322. James v. Trollop.

Bro. Preſcr. pl. 17. 31. A Preſcription in *Non decimando* cannot be pleaded in the Negative to an Action upon the Statute: But the Plea muſt be, that the Defendant and all thoſe whoſe Eſtate he has, have, for Time whereof the Memory of Man is not to the contrary, enjoyed the Premiſſes without paying Tithe for the ſame.

1 Jo. 6. Slade v. Drake. 1 Lev. 185. 32. If the Plea to an Action upon the Statute be, that the Premiſſes, of which Tithe is claimed were diſcharged thereof in the Hands of an Abbot, it muſt be ſhewn in what Manner they were diſcharged; for, as a Diſcharge of Tithes is againſt common Right, it ſhall be intended, unleſs the contrary appear, that the Diſcharge was perſonal.

Cro. Eliz. 584. Button v. Long. 33. If a Diſcharge of Tithe, by Reaſon of Unity of Poſſeſſion in the Hands of an Abbot and his Succeſſors, be pleaded to an Action upon the Statute, the Unity of Poſſeſſion is traverſable.

2 Inſt. 651. 34. In an Action upon the Statute the Plaintiff was not heretofore in any Caſe intitled to Coſts of Suit.

35. But by the 8 & 9 *W.* 3. *c.* 11. *par.* 3. it is enacted, "That in all "Actions of Debt upon the 2 & 3 *E.* 6. *c.* 13. wherein the ſingle Value "found by the Jury ſhall not exceed the Sum of twenty Nobles, the "Plaintiff obtaining Judgment, or any Award of Execution, after Plea "pleaded or Demurrer joined therein, ſhall recover his Coſts of Suit."

2 Inſt. 651. 36. It has been holden, that the Defendant, in an Action upon the Statute, is not intitled to Coſts; becauſe, as the Action is not an Action of Debt upon a Specialty, nor an Action for a perſonal Wrong done immediately to the Plaintiff, the Wrong in this Caſe ariſing from a Non-feaſance and not from a Male-feaſance, it is not within the Meaning of the 23 *H.* 8. *c.* 15. by which Coſts are in divers Caſes given to a Defendant.

37. But by the 8 & 9 *W.* 3. *c.* 11. *par.* 3. it is enacted, "That if the "Plaintiff, in any Action of Debt upon the 2 & 3 *E.* 6. *c.* 13. ſhall become "Nonſuit, or ſuffer a Diſcontinuance, or a Verdict ſhall paſs againſt him, "the Defendant ſhall recover his Coſts of Suit."

(Ee) Of recovering in a ſummary Way the Value of ſmall Tithes ſubtracted.

1. BY the 7 & 8 *W.* 3. *c.* 6. *par.* 1. it is for the more eaſy Recovery of ſmall Tithes, where the ſame do not amount to above the yearly Value of forty Shillings from any one Perſon, enacted, "That if any "Perſon ſhall ſubtract or withdraw, or fail in the Payment of ſuch ſmall "Tithes, by the Space of twenty Days after Demand thereof, that then "it ſhall be lawful for the Perſon, to whom the ſame ſhall be due, to "make his Complaint in Writing to any two Juſtices of the Peace, within "the County or Place where the ſame ſhall grow due; neither of which "Juſtices is to be Patron of the Church whence the ſaid Tithes ariſe, or "any Ways intereſted in ſuch Tithes."

2. But by *par.* 6. it is provided, "That no Complaint ſhall he heard as "aforeſaid, unleſs it ſhall be made within two Years after the ſame Tithes "become due."

3. And by *par.* 13. it is provided, "That no Perſon, who ſhall begin "any Suit for the Recovery of ſuch ſmall Tithes in the Court of Exche-"quer, or in any Eccleſiaſtical Court, ſhall have any Benefit of this Act "for the ſame Matter."

4. By

4. By *par.* 2. it is enacted, "That the ſaid Juſtices ſhall ſummon in "Writing under their Hands and Seals, by reaſonable Warning, every "Perſon againſt whom any Complaint ſhall be made as aforeſaid, and "after his Appearance, or upon Default of Appearance, the ſaid Warning "being proved before them upon Oath, the ſaid Juſtices ſhall proceed "to hear and determine the ſaid Complaint, and ſhall in Writing under "their Hands and Seals adjudge the Caſe, and give ſuch reaſonable Al-"lowance for ſuch Tithes as they ſhall judge to be juſt, and alſo ſuch "Coſts and Charges, not exceeding ten Shillings, as upon the Merits of "the Cauſe ſhall appear juſt."

3. And by *par.* 4. the Juſtices are impowered to adminiſter an Oath to any Witneſs produced.

6. But by *par.* 8. it is enacted, "That if any Perſon complained againſt "ſhall inſiſt upon any Preſcription, Compoſition, *Modus Decimandi* or "other Title, whereby he ought to be diſcharged of Tithes; and ſhall "deliver the ſame in Writing to the ſaid Juſtices; and ſhall give to the "Party complaining ſufficient Security, to pay all ſuch Coſts as ſhall be "given againſt him upon a Trial at Law, in Caſe the ſaid Title ſhall not "be allowed; that then the ſaid Juſtices ſhall forbear to give Judgment."

7. By *par.* 3. "A Diſtreſs is given, in Caſe of Refuſal or Neglect, by "the Space of ten Days after Notice given to pay ſuch Sum, as upon ſuch "Complaint ſhall be adjudged as aforeſaid."

8. By *par.* 12. it is enacted, "That the ſaid Juſtices ſhall have Power "to give Coſts, not exceeding ten Shillings, to the Party proſecuted, if "they find the Complaint falſe and vexatious."

9. By *par.* 5. it is provided, "That this Act ſhall not extend to Tithes "within the City of *London*, or in any other Place where the ſame are "ſettled by Act of Parliament."

10. By *par.* 7. An Appeal is given to the Seſſions, and it is moreover enacted, "That if the Juſtices there preſent, or the Majority of them, ſhall "confirm the Judgment of the two Juſtices, they ſhall decree the ſame by "Order of Seſſions, and proceed to give ſuch Coſts againſt the Appellant "as to them ſhall ſeem juſt and reaſonable."

11. By the ſame *par.* it is enacted, "That no Proceeding or Judgment, "had by Virtue of this Act, ſhall be removed or ſuperſeded, by any Writ "of *Certiorari*, or other Writ, out of his Majeſty's Courts at *Weſtminſter*, "or any other Court whatſoever, unleſs the Title to ſuch Tithes ſhall be "in Queſtion."

(Ff) Of recovering Tithes due from Quakers.

1. BY the 7 & 8 *W.* 3. *c.* 34. *par.* 4. it is enacted, "That where any "*Quaker* ſhall refuſe to pay or compound for his great or ſmall "Tithes, it ſhall be lawful for the two next Juſtices of the Peace of the "ſame County, other than ſuch Juſtice of the Peace as is Patron of the "Church or Chapel to which the ſaid Tithes belong, or any Ways intereſted "in the ſaid Tithes, upon the Complaint of the Perſon who ought to have "and receive the ſame, by Warrant under their Hands and Seals to con-"vene before them ſuch *Quaker*, and to examine upon Oath, which Oath "the ſaid Juſtices are impowered to adminiſter, or in ſuch Manner as by "this Act is provided, the Truth and Juſtice of the ſaid Complaint, and "to aſcertain what is due from ſuch *Quaker* to the Party complaining

"and

" and by Order under their Hands and Seals to direct the Payment thereof, " ſo as the Sum ordered as aforeſaid do not exceed ten Pounds; and upon " Refuſal by ſuch *Quaker* to pay according to ſuch Order, it ſhall be law- " ful for any one of the ſaid Juſtices, by Warrant under his Hand and Seal, " to levy the Money thereby ordered to be paid, by Diſtreſs and Sale of " the Goods of ſuch Offender."

2. By the ſame *par.* it is enacted, " That any Perſon, finding himſelf " aggrieved by any Judgment given by ſuch two Juſtices of the Peace, " may appeal to the next General Quarter-Seſſions, and the Juſtices of " the Peace there preſent, or the major Part of them, ſhall proceed finally " to hear and determine the Matter; and if the Juſtices then preſent, or " the major Part of them, ſhall find cauſe to continue the ſaid Judgment, " they ſhall then decree the ſame by Order of Seſſions, and ſhall proceed " to give ſuch Coſts againſt the Appellant, as to them ſhall ſeem juſt and " reaſonable."

3. And by the ſame *par.* it is enacted, " That no Proceeding or Judg- " ment, had by Virtue of this Act, ſhall be removed or ſuperſeded by any " Writ of *Certiorari*, or other Writ, out of his Majeſty's Courts at *Weſt-* " *minſter*, or any other Court whatſoever, unleſs the Title to ſuch Tithes " ſhall be in Queſtion."

4. By the 1 *Geo.* 1. *ſt.* 2. *c.* 6. *par.* 2. The like Remedy is given for the Recovery of all Tithes, and all other Eccleſiaſtical Dues, from *Quakers*, as is by the 7 & 8 *W.* 3. *c.* 34. given for Tithes to the Value of ten Pounds.

5. And it is thereby further enacted, " That any two or more Juſtices " of the Peace of the ſame County or Place, other than ſuch Juſtice as is " Patron of the Church or Chapel to which the ſaid Tithes or Dues belong, " or any Ways intereſted in the ſaid Tithes, upon Complaint of any Par- " ſon, Vicar, Curate, Farmer or Proprietor of ſuch Tithes, or other " Perſon who ought to have, receive or collect, any ſuch Tithes or Dues, " are hereby required to ſummon in Writing under their Hands and Seals, " by reaſonable Warning, ſuch *Quaker* or *Quakers*, againſt whom ſuch " Complaint ſhall be made; and after his or their Appearance, or upon " Default of Appearance, the ſaid Warning or Summons being proved " before them upon Oath, to proceed to hear and determine the ſaid " Complaint, and to make ſuch Order therein as in the ſaid Act is limited " or directed; and alſo to order ſuch Coſts and Charges, not exceeding " ten Shillings, as upon the Merits of the Cauſe ſhall appear juſt; which " Order ſhall and may be appealed to, and on ſuch Appeal may be re- " verſed or affirmed by the General Quarter-Seſſions of the County or " Place, with ſuch Coſts and Remedy for the ſame, and ſhall not be re- " moved into any other Court, unleſs the Title to ſuch Tithes ſhall be in " Queſtion, in like Manner as in and by the 7 & 8 *W.* 3. *c.* 34. is limited " and provided."

(Gg) What Remedy an Occupier has, when the Perſon intitled to Tithe does not fetch it away in a reaſonable Time.

Binb. 73. Dodſon v. Oliver.

1. IF the Perſon intitled to the Tithe of Milk do not fetch it away before the next milking Time, the Pariſhioner may pour it upon the Ground; becauſe he may then have Occaſion for the Pail, or other Veſſel, in which it was ſet out.

2. Although

2. Although a predial Tithe be not fetched away in a reaſonable Time by the Perſon intitled thereto, the Occupier of the Land, upon which it is ſet out, cannot juſtify the diſtraining thereof Damage-feaſant; but he may have an Action for the Damage ſuſtained by its lying too long upon the Land. 3 Bulſtr. 337. Mountford v. Sidley. Latch 8.

3. The Occupier of the Land, upon which Tithe is ſet out, cannot juſtify the putting of his Cattle upon the Land, before the Tithe is fetched away; for it is probable, that the Perſon intitled thereto would ſuſtain more Damage by having his Tithe deſtroyed by the Cattle, than the Occupier would by being deprived for ſome Time of the Uſe of his Land: And it is much more reaſonable, to leave the Occupier to his Remedy by Action, than to ſuffer him to judge when the Tithe has lain there too long. Ld. Raym. 198. Shapcott v. Mugford. Com. 24.

4. But if the Perſon intitled thereto have neglected to fetch away Tithe in a reaſonable Time, and Cattle, either of the Occupier of the Land upon which the Tithe is ſet out, or of a Stranger, do without the Default of the Occupier come upon the Land, and deſtroy the Tithe, the Loſs muſt fall upon the Perſon who neglected to fetch it away. 2 Leon. 101. Bennet v. Shortwright. Cro. Eliz. 206.

5. An Action of Treſpaſs does not lie againſt the Perſon entitled to Tithe, for not having fetched it away in a reaſonable Time; becauſe the Injury to the Occupier of the Land does not ariſe from a Mal-feaſance but from a Non-feaſance. Latch 8. Stilman v. Chanot. Ld. Raym. 189.

6. But the Remedy of the Occupier of the Land, in Caſe the Tithe be not fetched away in a reaſonable Time, is by an Action upon the Caſe. 3 Bulſtr. 337. Mountford v. Sidley. Latch 8. Ld. Raym. 188.

7. An Action for not having fetched away Tithe in a reaſonable Time, does not lie, unleſs the Tithe were ſet out by a Perſon, who had ſome Colour of Title to the Land upon which it aroſe: Becauſe, as the Severance of Tithe by a Stranger does not veſt ſuch a Property in the Perſon entitled thereto, as to enable him to maintain an Action againſt a Perſon who does afterwards carry it away, it is not reaſonable, that he ſhould be liable to an Action for not having fetched it away. 3 Bulſt. 337. Mountford v. Sidley. Latch 8.

8. Before the Occupier of the Land can maintain an Action againſt the Perſon entitled thereto, for not having fetched away Tithe in a reaſonable Time, he muſt give Notice of its being ſet out: Becauſe, as the former was not obliged to give Notice at what Time he intended to ſet the Tithe out, the latter may not know that it is ſet out. 1 Roll. Abr. 644. X. pl. 1.

9. And after the Perſon intitled thereto has had Notice of Tithe being ſet out, he muſt, before an Action can be maintained againſt him for not having fetched the Tithe away, have a reaſonable Time to fetch it away; and the Queſtion, what is a reaſonable Time? is proper for the Determination of a Jury. 3 Bulſtr. 356. Mountford v. Sidley. Bro. Diſm. pl. 12. Ld. Raym. 189. Str. 246.

TREASON.

TREASON.

THE Word Treaſon is derived from the *French* Word *Trahir*, which ſignifies to betray.

There are two Sorts of Treaſon, High Treaſon and Petit Treaſon.

High Treaſon is an Offence againſt that Allegiance, which is due to the King from every Man who lives under his Protection.

High Treaſon is ſo called, by Reaſon of the Greatneſs of the Perſonage againſt whom it is committed.

High Treaſon, it being an Offence of the moſt dangerous and fatal Conſequences to Society, has, in Order to deter Men from being guilty thereof, at all Times been puniſhed by the Law of *England* with the utmoſt Severity. It has for the ſame Reaſon been more ſtrictly guarded againſt than any other Offence. To every other Felony an actual Commiſſion of the Felony is neceſſary: But an Intention to commit High Treaſon is in ſome Caſes equivalent to the actual Commiſſion thereof.

Petit Treaſon conſiſts in the Murder of a Perſon, by one who was under a peculiar Obligation to preſerve and defend the Life of the Perſon murdered.

This Offence, it being of very dangerous Example, has always been puniſhed, by the Law of *England*, with more Severity than any other Murder.

Some Things, which relate to the Offence of High Treaſon, have been already treated of; as Commitment for High Treaſon, under the Title *Commitment*; Forfeiture and Corruption of Blood, for High Treaſon, under the Title *Forfeiture*.

The Remainder of what appertains to this Title ſhall be ranged in the following Order:

(A) Who may be guilty of High Treaſon.
(B) Againſt whom High Treaſon may be committed.
(C) Of High Treaſon in the general.
(D) Of compaſſing or imagining the Death of certain Perſonages.
(E) Of violating certain Perſonages.
(F) Of levying War againſt the King.
(G) Of adhering to the King's Enemies.
(H) Of counterfeiting the Great Seal, Privy Seal, Privy Signet or Sign Manual.

(I) Of

(I) Of counterfeiting or diminishing the Money current.
(K) Of bringing counterfeit Money into the Realm.
(L) Of slaying certain Officers.
(M) Of extolling or maintaining the Power of the See of Rome.
(N) Of refusing a second Time to take the Oath of Supremacy.
(O) Of putting a Popish Bull in Ure.
(P) Of reconciling any Person, or being reconciled, to the See of Rome.
(Q) Of receiving Popish Orders or Education.
(R) Of denying the Power of Parliament to limit the Succession of the Crown.
(S) Of affirming that a Person, not in the Succession as by Law established, has a Right to the Crown.
(T) Of endeavouring to hinder the Person, next in the Succession as by Law established, from succeeding to the Crown.
(U) Of corresponding with the Pretender or one of his Sons.
(W) Of corresponding, or treating, with a Rebel or Enemy.
(X) Of Petit Treason in the general.
(Y) Of slaying a Husband by his Wife.
(Z) Of slaying a Master by his Servant.
(Aa) Of slaying a Prelate by an Ecclesiastic, who owes Obedience to the Prelate.
(Bb) Of the Indictment of Treason.
(Cc) Of the Trial of Treason.
(Dd) Of the Evidence of Treason.
(Ee) Of the Judgment of Treason.

(A) Who may be guilty of High Treason.

1. EVERY Subject, who is of the Age of Discretion, may be guilty of High Treason. 3 Inst. 4. 1 Hawk. P. C. 2, 35.

2. The Duty of Allegiance to the King is so inseparable from a natural-born Subject, that, notwithstanding all he can do to renounce his Allegiance, or to transfer it to a foreign Prince, whatever would be High Treason in another Person, is so in him. 1 Inst. 129. 1 Hawk. P. C. 35.

3. If

Bac. Max. 56, 57. 3. If a Feme-Covert commit High Treaſon by the Command of her Huſband, the Command does not excuſe her, as it does in the Caſe of ſome other Felonies.

3 Inſt. 6. 4 Rep. 124. 4. In ancient Times, if a Madman had been guilty of an Attempt upon the Life of the King, it would have been High Treaſon.

3 Inſt. 6. 1 Hawk. P. C. 35. 5. But ſince the Statute of the Twenty-fifth Year of the Reign of *Edward* the Third, the Words of which are, "When a Man doth *compaſs or* "*imagine* the Death of our Lord the King," it has been holden, that a Perſon not *compos Mentis* is incapable of *compaſſing or imagining*; and conſequently, that ſuch Perſon cannot be guilty of that Species of High Treaſon, which conſiſts in *compaſſing or imagining* the Death of the King.

6. By the 33 *H.* 8. *c.* 20. *par.* 1. it was enacted, "That if any Perſon "ſhall commit High Treaſon, when he is of good and perfect Memory, "and after Accuſation or Confeſſion thereof ſhall fall to Madneſs, the "Treaſon done by ſuch Perſon ſhall be tried in his Abſence; and that the "Offender ſhall, if found guilty, ſuffer ſuch Pains and Forfeitures, as if "he had been of good and perfect Memory, and had been perſonally "arraigned."

7. And by *par.* 2. it was enacted, "That if any Perſon ſhall be attaint-"ed of High Treaſon, and afterwards fall into Madneſs, he ſhall notwith-"ſtanding ſuch Madneſs have and ſuffer Execution."

3 Inſt. 4, 6. 8. This cruel Law, as it was highly reaſonable it ſhould, was ſoon repealed; for the Deſign of all Puniſhments is Example, *ut pœna ad paucos metus ad omnes perveniat:* But when a Madman is executed, it is a miſerable Spectacle as well as an Inſtance of Inhumanity and Cruelty, and the Execution of ſuch a Man can never be an Example to others.

3 Inſt. 8. 9. The Huſband of a Queen Regent may be guilty of High Treaſon againſt his Wife; becauſe ſuch a Queen is in the Eye of the Law a diſtinct Perſon to divers Purpoſes from her Huſband.

Ibid. 10. And for the ſame Reaſon a Queen Conſort may commit High Treaſon againſt her Huſband.

3 Inſt. 11. 7 Rep. 6. Ld. Raym. 1. Salk. 632. 11. An Alien, who comes into the Kingdom in an hoſtile Manner, is not thereby guilty of High Treaſon, becauſe he owes no Allegiance to the King.

7 Rep. 6. Calvin's Caſe. 3 Inſt. 5. Hob. 271. Ld. Raym. 1. Salk. 632. 12. But an Alien, who came at firſt peaceably into the Kingdom, and has lived therein ſome Time, may commit High Treaſon: For, as he has enjoyed the Protection of the King, a local Allegiance is in Return due from him.

1 Hawk. P. C. 35. Foſt. 187. 13. It ſeems to be the better Opinion, that no Ambaſſador from a foreign Prince, nor any one of the Attendants of ſuch Ambaſſador, can be guilty of High Treaſon; unleſs he make an Attempt upon the Life of the King.

(B) Againſt whom High Treaſon may be committed.

3 Inſt. 7. H. P. C. 12. 1 Hawk. P. C. 35. 1. HIGH Treaſon may be committed againſt the Perſon in actual Poſſeſſion of the Crown, although ſuch Perſon be only King or Queen *de Facto*, and not *de Jure*; for as the Lives and Properties of the People are protected

protected by such King or Queen, during his or her Administration of the Laws, Allegiance is in Return due for this Protection.

2. By the 11 *H.* 7. *c.* 1. it is enacted, "That no Person, who attends "upon the King for the Time being, to do him true and faithful Service "of Allegiance, or is in other Places by his Commandment in his Wars, "within this Land or without, shall for the said Deed be convicted of "High Treason."

3. And it has been holden, That if High Treason have been committed against a King *de Facto*, and the King *de Jure* afterwards come to the Crown, the Offence is still punishable as High Treason. 3 Inst. 7. Bro. Treas. pl. 10. H. P. C. 12. 1 Hawk. P. C. 36.

4. It is in the general true, that High Treason cannot be committed against the Person who has a Right to the Crown, so long as a King *de Facto* is in the actual Possession thereof; because Allegiance is only due to the latter. 3 Inst. 7. H. P. C. 12. 1 H.H.P. C. 101. 1 Hawk.P.C 35, 36.

5. It was indeed resolved by the Judges after the Restoration of King *Charles* the second, that all the Acts done to prevent his acquiring the actual Possession of the Crown were High Treasons. Kel. 15. The Case of the Regicides.

6. But this Resolution is quite reconcileable, with what is laid down in the Books last cited: For it had been first resolved by the same Judges, that King *Charles* the Second, notwithstanding he had been for some Years hindred from exercising the regal Power, had all that Time been King *de Facto* as well as *de Jure*; and it is certain, that no other Person had during that Time been in the actual Possession of the Crown. Kel. 15. 1 Keb. 315, 454. 1 Hawk. P. C. 36.

7. High Treason may be committed against the Person on whom the Crown does rightfully descend, although he have not been crowned; for it has been determined by all the Judges, that the Coronation of a King is only a Ceremony. 3 Inst. 7. Watson's Case. H. P. C. 12. 1 Hawk. P. C. 36.

8. As there must sometimes be a Failure of Justice, if there were not always a Person in whose Name the Laws might be administered, it is a Maxim *that the King never dies*; and consequently High Treason may be committed against a King before his Proclamation: For he becomes King immediately upon the Demise of the Person to whom he succeeds. 3 Inst. 7. 1 H.H.P.C. 101. 1 Hawk. P. C. 36.

9. But if the next Heir to the Crown be of the Popish Religion, or have married a Papist, the Crime of High Treason cannot be committed against such Person; for by the 1 *W.* & *M. st.* 2. *c.* 1. *par.* 9. it is enacted, "That "every Person, who is or shall be reconciled to or hold Communion with "the See or Church of *Rome*; or shall profess the Popish Religion; or "shall marry a Papist; shall be excluded and be for ever incapable to "inherit, possess or enjoy, the Crown and Government of this Realm "and *Ireland*, and the Dominions thereunto belonging, or any Part of "the same; or to have, use or exercise, any regal Power, Authority "or Jurisdiction, within the same; and in all and every such Case or "Cases the People of these Realms shall be, and hereby are absolved of "their Allegiance."

(C) Of High Treaſon in the general.

Bro. Treaſ. pl. 14. 1 Hawk. P. C. 34.

1. DIVERS Offences which are not mentioned in the 25 *Ed.* 3. *ſt.* 5. *c.* 2. were before the making of this Statute Treaſon.

3 Inſt. 7.

2. It was High Treaſon, to have compaſſed the Death of the Father or Uncle of the King.

Ibid.

3. If a Subject of this Realm, inſtead of having ſummoned another Subject to anſwer in the King's Courts, had ſummoned him to appear before the Tribunal of a foreign Prince, this was High Treaſon.

4. By the 25 *Ed.* 3. *ſt.* 5. *c.* 2. After declaring certain Offences to be Treaſons, it is enacted, "That becauſe many other like Caſes of Treaſon "may happen in Time to come, which a Man cannot think or declare "at this preſent Time, if any other Caſe, ſuppoſed to be Treaſon which "is not ſpecified above, doth happen before any Juſtice, the Juſtice ſhall "tarry, without proceeding to Judgment of Treaſon, until the Caſe be "laid before the King in Parliament, and it be declared, whether it ought "to be adjudged Treaſon or other Felony."

3 Inſt. 22, 23.

5. Notwithſtanding this Statute, ſome Juſtices did preſume to adjudge certain Offences, not mentioned in this Act, to be High Treaſons: But they were for ſo doing ſeverely puniſhed.

3 Inſt. 8, 14, 23.

6. In Conſequence of the Power given by this Statute, divers Offences were by different Parliaments declared to be High Treaſons.

3 Inſt. 14, 23.

7. As ſome of the Acts of Parliament, by which theſe Offences were ſo declared, were penned in general Terms; others of them in particular Terms; and others in obſcure Terms: And as ſome Offences, which had in ſome Parliaments been declared to be High Treaſons, were in other Parliaments declared not to be ſo, the Miſchief, which aroſe from the Difficulty of knowing what was or what was not High Treaſon, became as great as it had been before the making of the 25 *Ed.* 3. *ſt.* 5. *c.* 2.

8. In Order to remedy this Miſchief, it is by the 1 *Mar. ſt.* 1. *c.* 1. *par.* 3. enacted, "That from henceforth none Act, Deed or Offence, being by "Act of Parliament made Treaſon, by Words, Writing, Cyphering, "Deeds or otherwiſe whatſoever, ſhall be taken, had, deemed or adjudged, "to be High Treaſon, but only ſuch as be declared and expreſſed to be "Treaſon, in or by the Act of Parliament made in the Twenty-fifth Year "of the Reign of the moſt noble King of famous Memory, *Edward* the "Third, touching or concerning Treaſon or the Declaration of Treaſon, "and none other; any Act or Acts of Parliament, had or made at any "Time heretofore, or after the ſaid Twenty-fifth Year of the Reign of the "ſaid late King *Edward* the Third, or any other Declaration or Matter "to the contrary in any wiſe notwithſtanding."

1 Hawk. P. C. 43.

9. As it is by this Statute enacted, that from henceforth no Offence ſhall be adjudged High Treaſon, but only ſuch as be declared and expreſſed to be Treaſon by the 25 *Ed.* 3. *ſt.* 5. *c.* 2. it ſeems that the Parliament have no Power under the 25 *Ed.* 3. *ſt.* 5. *c.* 2. of declaring any Offence High Treaſon.

10. And if this be ſo, it follows, that no Offence is at this Day High Treaſon, unleſs it is declared to be ſo by the 25 *Ed.* 3 *ſt.* 5. *c.* 2. or has been made ſo by ſome Statute ſubſequent to the 1 *Mar. ſt.* 1. *c.* 1.

Plowd. 86. 3 Inſt. 12, 20, 21. 18. El. c. 1. ſ. 1.

11. An Offence is not to be adjudged High Treaſon, unleſs it be clearly, and without Argument or Inference, within the Meaning of ſome Act of Parliament; for no Statute, whereby an Offence is declared to be High Treaſon, is to be extended by Equity.

12. There

12. There can be no Acceſſary in High Treaſon. Bro. Treaſ. 19. 3 Inſt. 9, 138. H. P. C. 127, 215. 2 Hawk. P. C. 310.

13. It ſeems to have been always agreed, that the ſame Thing, which would have made a Man an Acceſſary before the Fact in any other Felony, does make him a Principal in High Treaſon. 1 Inſt. 21, 138. H. P. C. 127, 215. 2 Hawk. P. C. 310.

14. It has been holden, that the receiving and aiding of a Traytor, after the Offence has been committed, does not, in the Caſe of counterfeiting the King's Money, make a Man a Principal in High Treaſon. Dyer 296. Conier's Caſe.

15. But the better Opinion is, that the receiving and aiding of a Man, who has been guilty of counterfeiting the King's Money, does make the Perſon thereof guilty a Principal in High Treaſon. 3 Inſt. 8, 13. H P. C. 127, 215. Keb. 33. 2 H. P. C. 310.

16. By the 7 *Ann. c.* 21. *par.* 1. it is enacted, "That after the firſt Day "of *July* one Thouſand ſeven Hundred and Nine, ſuch Crimes and Offen- "ces, which are High Treaſon within *England*, ſhall be conſtrued, adjudg- "ed and taken to be, High Treaſon within *Scotland*; and that from thence- "forth, no Crimes or Offences ſhall be High Treaſon within *Scotland*, but "thoſe that are High Treaſon within *England*."

17. The Diſtinction of High and Petty Treaſon was not known to the Law of *Scotland*; for every Offence, which was by the Law of *England* Petit Treaſon, was by the Law of *Scotland* Treaſon.

18. At this Day, an Offence, which is in *England* Petit Treaſon, is in *Scotland*; only a capital Offence: It being by the 7 *Ann. c.* 21. *par.* 7. enacted, "That Murder, under Truſt, which was by the Law of *Scotland* "Treaſon, ſhall for the Time to come be only adjudged and deemed to "be a capital Offence."

(D) Of compaſſing or imagining the Death of certain Perſonages.

BY the 25 *Ed.* 3. *ſt.* 5. *c.* 2. *par.* 1. It is declared to be High Treaſon, "When a Man doth compaſs or imagine the Death of our Lord the "King, our Lady his Companion, or of their eldeſt Son and Heir; and "thereof be provably attainted of overt Deed by the People of their Con- "dition."

2. The Word Companion, in this Clauſe means Wife. 3 Inſt. 8, 9.

3. A Queen Regnant is not expreſsly mentioned in this Clauſe; but the Conſtruction has been, that ſuch a Queen is within the Meaning of the Words *our Lord the King*. 3 Inſt. 7. H. P. C. 12. 1 Hawk. P. C. 36.

4. The Huſband of a Queen Regnant ſeems to be within the Meaning of the Words in this Clauſe, our Lady his Companion: But as ſuch Huſband is not expreſsly mentioned, it has been holden, that it is not High Treaſon to compaſs or imagine his Death 3 Inſt. 7. H. P. C. 12. 1 Hawk. P. C. 36.

5. This Clauſe does not extend to a Queen Dowager; inaſmuch as ſhe is not the Companion of the King. 3 Inſt. 8. 1 H. H. P. C. 124. 1 Hawk. P. C. 37.

3 Inſt. 9. 1 H. H.P.C. 124. 6. If the Companion of a King be divorced *a vinculo matrimonii*, it is not High Treaſon to compaſs or imagine her Death; becauſe ſhe ceaſes to be the Companion of the King.

3 Inſt. 8. H. P. C. 12. 1 Hawk. P. C. 37. 7. If the eldeſt Son of the King or Queen die during the Life of the King or Queen, without leaving Iſſue, this Clauſe extends to the next Son; becauſe he thereby becomes the eldeſt Son and Heir.

1 H. H.P.C. 125, 126. 8. But it has been doubted, whether, if the eldeſt Son of the King or Queen die during the Life of the King or Queen, and leave Iſſue a Son, it be high Treaſon to compaſs or imagine the Death of ſuch Son.

1 H.H.P.C. 126, 127. 9 It is ſaid, that the eldeſt Daughter of the King or Queen is not within the Meaning of this Clauſe.

3 Inſt. 9. 10. It is in one Book laid down, that this Clauſe does not extend to a collateral Heir, notwithſtanding he has been proclaimed Heir-apparent: But it is added, that if a collateral Heir be declared Heir-apparent by Act of Parliament, it extends to him.

1 H.H.P.C. 125. 11. In another Book it is doubted, whether this Clauſe does extend to any collateral Heir.

3 Inſt. 6. 1 Hawk. P. C. 35. 12. As the Words in this Clauſe *compaſs or imagine* do imply Deſign, it follows, that the taking away the Life of one of the Perſons included therein is not High Treaſon, unleſs it be accompanied with ſome Circumſtance of Deſign.

3 Inſt. 6. 1 Hawk. P. C. 35. 13. And before the making of the 25 *Ed.* 3. *ſt.* 2 *c.* 5. it was holden, in the Caſe of Sir *Walter Tyrrel*, who ſhot an Arrow by which *William* the Second was killed, that the taking away the Life of this Prince, by the accidental glancing of the Arrow, was not High Treaſon.

1 H. H.P.C. 119. Kel. 17. 14. But wherever a Deſign upon the Life of one of the Perſons comprehended in this Clauſe is manifeſted by an overt Act, this, although the Deſign be not afterwards carried into Execution, is High Treaſon; inaſmuch as the Words of the Clauſe are, "doth compaſs or *imagine*."

Kel. 17. Foſt. 196. 15. If divers Perſons meet and conſult how to kill the King, this is in every one of them an overt Act of compaſſing or imagining his Death, although no Method of killing him be agreed upon.

3 Inſt. 140. H.P.C. 127. Kel. 17, 21. 1 Hawk. 56. 16. Nay the Knowledge of a Deſign to deſtroy the King, if accompanied with any Circumſtance of Aſſent or Approbation, is an overt Act of compaſſing or imagining his Death.

Kel. 17, 21. The Caſe of the Regicides. 1 Hawk. P. C. 56. 17. If a Man, knowing that a Meeting is to be holden to conſult the Deſtruction of the King, go to ſuch Meeting, this, although while there he ſay nothing, is Evidence proper to be left to a Jury of his Aſſent to, or Approbation of, the traiterous Intention.

Kel. 17, 21. The Caſe of the Regicides. 1 Hawk. P. C. 56. 18. If a Man, who has been accidentally preſent at a Meeting holden to conſult the Deſtruction of the King, go a ſecond Time to ſuch Meeting, this is Evidence of his Aſſent to, or Approbation of, the traiterous Deſign.

19. Divers other Acts, beſides thoſe which manifeſt a direct Deſign upon the King's Life, are overt Acts of compaſſing or imagining his Death.

3 Inſt. 14. H. P. C. 13. Dyer 238. 1 Hawk. P. C. 35. 20. If a Man excite a foreign Prince to invade the Realm, this is an overt Act of compaſſing or imagining the King's Death; becauſe ſuch Excitation has a natural Tendency to bring the King's Life into Danger.

3 Inſt. 12. H. P.C. 13. Kel. 21. Moor 621. 21. The aſſembling of Men, with an Intention of compelling the King to comply with certain Demands, is for the ſame Reaſon an overt Act of compaſſing or imagining his Death.

22. If

22. If divers Perſons are aſſembled for the Purpoſe of impriſoning the King, this is an overt Act in every one of them of compaſſing or imagining his Death: Inaſmuch as it is probable that ſuch Impriſonment will end in his Death. 3 Inſt. 6, 12. H. P. C. 11. 1 Hawk. P. C. 35.

23. It hath been doubted, whether the aſſembling of Men with Deſign to depoſe the King be an overt Act of compaſſing or imagining his Death; becauſe there may, as it is ſaid, be a Deſign to depoſe the King without an Intention to take away his Life. Bro. Treaſ. pl. 24.

24. But it ſeems to be the better Opinion, that the aſſembling of Men with Deſign to depoſe the King is an overt Act of compaſſing or imagining his Death: Becauſe, if this Deſign be carried into Execution, the Death of the King will in all Probability be the Conſequence. 3 Inſt. 6, 12. H. P. C. 11. 2 Ventr. 316. 11 Mod. 322. 1 Hawk. P. C. 35.

25. It is ſaid that a Conſpiracy to levy War againſt the King is not an overt Act of compaſſing or imagining his Death; for that, as the levying of War is by another Clauſe of the Statute declared to be one Species of Treaſon; ſuch Conſpiracy ought not to be deemed an overt Act of another Species of Treaſon; for that, if it ſhould be ſo deemed, two Species of Treaſon would be confounded. 3 Inſt. 14.

26. But it has been reſolved by all the Judges, that although the Perſons ſo levying War that may be indicted for the Treaſon of levying War, they may nevertheleſs be indicted for compaſſing or imagining the King's Death; and that the levying of War may be laid as an overt Act of compaſſing or imagining the King's Death. Kel. 20, 21. The Caſe of the Regicides.

27. And in this Caſe, beſides expreſsly denying what is laid down in 3 *Inſt.* 14. to be Law, it is ſaid, that what is there laid down is contrary to the Caſes of Lord *Cobham* and the Earl of *Eſſex*, which are cited by *Coke* Chief Juſtice but two Pages before: In the laſt of which it had been holden, that the gathering of Men together, with a Deſign to compel the Queen to comply with certain Demands, was an overt Act of compaſſing or imagining her Death.

28. But perhaps, upon conſidering the two Paſſages, they will be found quite conſiſtent.

29. The Deſign in the Caſes of Lord *Cobham* and the Earl of *Eſſex* was to get the Queen into the Power of the Perſons aſſembled. 3 Inſt. 12.

30. But in 3 *Inſt.* 14. *Coke* Chief Juſtice only ſpeaks of a levying War againſt the King generally.

31. Now although the two Propoſitions, that levying of War with a Deſign againſt the Perſon of the King is an overt Act of compaſſing or imagining his Death, and that levying of War againſt the King generally is not ſo, are not both Law, they are by no Means contradictory to each other.

32. But it may be fairly inferred from two modern Books, that both the Propoſitions are Law.

33. In one of theſe, it is ſaid to have been reſolved by the Court of King's Bench at a Trial at Bar, that a Conſpiracy to levy War in order to depoſe the King, which would be the Civil Death of the King, is an overt Act of compaſſing or imagining his Death: But that a Conſpiracy to levy War againſt the King generally is not ſo; becauſe there may be ſuch a levying of War as is treaſonable, without an Intention to depoſe the King. 11 Mod. 322. Dorrel's Caſe. Mich. 2 G. 1.

34. In the other theſe Words are uſed in treating of that Species of Treaſon, which conſiſts in compaſſing or imagining the King's Death: "It "hath been adjudged, that levying of War againſt the King's Perſon, "or the bare conſulting to levy ſuch War, is an overt Act of compaſſing "or imagining his Death." But the Book does not ſay, that the levying of War or the conſulting to levy a War, againſt the King generally is ſo. 1 Hawk. P. C. 38.

35. It ſeems to be agreed, that the publiſhing of written or printed Words may be an overt Act of compaſſing or imagining the King's Death.

2 Roll. Rep. 88. Williams's Caſe.

36. And it has been holden, that the printing of a Book containing treaſonable Poſitions, and ſending it in a Box to the King, is a Publication of the Book.

Dyer 298. 2 Roll. Rep. 89. 1 Hawk. P. C. 36.

37. If any Words in Writing or Print are publiſhed, which have a direct Tendency to alienate the Affections of the People from the King, ſuch Publication is an overt Act of compaſſing or imagining his Death: Becauſe this will in all Probability be the Conſequence.

3 Inſt. 14. H. P. C. 13.

38. The publiſhing of a printed Book, or ſending of a Letter, to excite a foreign Prince to invade the Realm, is an overt Act of compaſſing or imagining the King's Death: For if there ſhould be an Invaſion, his Life would certainly be in Danger.

Kel. 22, 23. Twyne's Caſe.

39. If a Book be publiſhed, in which it is aſſerted, that it is high Time for the People to take the Government into their own Hands, and that it is honourable and conſcientious to throw off all Allegiance, and to put the King to Death, this is an overt Act of compaſſing or imagining the King's Death.

2 Roll. Rep. 88, 89. Williams's Caſe.

40. It has been holden, that to publiſh in Writing or Print a Prophecy of the King's Death is an overt Act of compaſſing or imagining his Death.

1 H. H.P.C. 108.

41. But in another Book it is ſaid, that to prophecy the King's Death does not ſeem to be an overt Act of compaſſing or imagining his Death.

H. P. C. 11. 1 H. H. P.C. 108.

42. And it is in the ſame Book expreſsly laid down, that to calculate the King's Nativity is not an overt Act of compaſſing or imagining his Death.

2 Roll. Rep. 89. Williams's Caſe. 3 St. Tri. 733. Sidney's Caſe. Cro. Car. 125.

43. It has been holden, that the writing of Words, which contain a treaſonable Poſition, does, although the ſame are never publiſhed, amount to an overt Act of compaſſing or imagining the Death of the King: For that *Scribere eſt agere*.

1 Hawk. P. C. 38. Foſt. 198.

44. But it ſeems to be the better Opinion, that the writing of ſuch Words, unleſs they relate to ſome determinate treaſonable Deſign upon the King's Life, does not, whilſt the Words remain in the Hands of the Writer unpubliſhed, amount to an overt Act of compaſſing or imagining the King's Death; becauſe they may have been written merely by Way of Amuſement, and without any traiterous Deſign.

3 Inſt. 14, 38, 140. 1 H. H. P.C. 111, 112.

45. It is laid down in two Books, that the bare ſpeaking of Words can never be an overt Act of compaſſing or imagining the King's Death; and from the ſpecial Acts of Parliament, made at different Times after the 25 *Ed.* 3. *ſt.* 5. *c.* 2. to attaint Perſons guilty of ſpeaking treaſonable Words, it is inferred, that ſuch Words are not an overt Act of compaſſing or imagining the King's Death within the Meaning of that Statute; for that, if they are ſo, the ſpecial Acts would have been quite nugatory.

St. P. C. 2. Yelv. 107. Kel. 13. 1 Lev. 57. Salk. 631. 3 Mod. 55.

46. It is in other Books laid down, that the bare ſpeaking of Words may be an overt Act of compaſſing or imagining the King's Death; for that Words are the moſt natural Way of expreſſing the Imagination of the Heart.

1 Hawk. P. C. 39, 40.

Foſt. 209.

47. In a modern Book it is ſaid, that the Rule which has been laid down ſince the Revolution is, that the ſpeaking of Words not relative to a Deſign upon the King's Life does not amount to an overt Act of compaſſing or imagining his Death: But that the ſpeaking of Words relative to a Deſign

upon

upon the King's Life does amount to an overt Act of compaſſing or imagining his Death.

48. The ſpeaking of theſe Words, *If I meet the King I will kill him*, has been holden an overt Act of compaſſing or imagining his Death. 1 Lev. 57. Allcock's Caſe.

49. It has been holden, that the ſpeaking of theſe Words, *the King being excommunicated by the Pope may be depoſed and killed by any whatſoever, which killing is not Murder*, is an overt Act of compaſſing or imagining his Death. 1 Roll. Rep. 185. Owen's Caſe.

50. And it is ſaid by *Holt* Chief Juſtice, that it is not neceſſary, that the Words ſhould in ſuch Caſe be expreſs: For that the ſpeaking of any Words, provided the Jury are fully convinced, from the Tenor of them, that the Speaker had a Deſign upon the King's Life, is an overt Act of compaſſing or imagining his Death. 4 Stat. Tri. 723. Lowick's Caſe.

51. It is laid down, that the ſpeaking of Words, which plainly ſhew a Deſign upon the King's Life, is an overt Act of compaſſing or imagining his Death: Although the Deſign be future or conditional, or both future and conditional. St. P. C. 2. Yelv. 107. Kel. 13. 2 Mod. 55. 1 Hawk. P. C. 39.

52. It ſeems to be agreed, that the ſpeaking of Words in Contempt or Diſgrace of the King's Perſon, as where the import of the Words is a Charge of a perſonal Vice or a perſonal Defect, is not an overt Act of compaſſing or imagining his Death. Cro. Car. 125. Pine's Caſe. 1 Hawk. P. C. 39.

53. It is in ſome Books laid down, that to ſay the King is a Baſtard, or to ſay that another Perſon has a better Title to the Crown than him, is an overt Act of compaſſing or imagining his Death; becauſe it diſcovers the Mind to be traiterous. Yelv. 107. 2 Roll. Rep. 90. Palm. 426.

54. But it is in one Caſe ſaid, that the ſpeaking of looſe Words, which have no Relation to a Deſign upon the King's Life, is not an overt Act of compaſſing or imagining his Death. Salk. 631. Charnock's Caſe.

(E) Of Violating certain Perſonages.

1. BY the 25 *Ed.* 3. *ſt.* 5. *c.* 2. it is declared to be High Treaſon, "If "a Man do violate the King's Companion, or the eldeſt Daughter "of the King not being married, or the Companion of the eldeſt Son and "Heir of the King; and thereof be provably attainted of overt Deed, by "People of his Condition."

2. The Word violate in this Clauſe does mean no more than carnally know; for if a Man have had carnal Knowledge of one of the Perſonages therein comprehended with her Conſent, he is equally guilty of High Treaſon, as if he have had it by Force. 3 Inſt. 9.

3. The Word Companion in this Clauſe means Wife. 3 Inſt. 8, 9.

4. This Clauſe does not extend to the Violation of a Queen Dowager or a Princeſs Dowager; becauſe neither of theſe is the Companion of the King, or of the eldeſt Son and Heir of the King. 3 Inſt. 8, 9. H. P. C. 12. 1 Hawk. P. C. 37.

5. If carnal Knowledge have been had of one of the Perſonages comprehended within this Clauſe with her Conſent, ſhe is guilty of High Treaſon. 3 Inſt. 9. 1 H. H. P. C. 125.

6. If

3 Inſt. 9. 1 H.H. P. C. 124. 6. If one of the Perſonages, whom it would have been High Treaſon to violate during Coverture, be divorced *a Vinculo matrimonii*, it is not High Treaſon to violate her; becauſe ſuch Perſonage does after the Divorce ceaſe to be the Companion of the King, or of the eldeſt Son and Heir of the King.

3 Inſt. 7. H. P. C. 12. 1 Hawk. P. C. 36. 7. It is laid down, that the eldeſt Daughter of a Queen Regnant, not being married, although not within the Words of this Clauſe, is within the Meaning thereof.

3 Inſt. 9. 8. If the eldeſt Daughter of the King or Queen die during the Life of the King or Queen, the Violation of the next Daughter, who thereby becomes the Eldeſt, while ſhe is unmarried is High Treaſon; for by the Words the *Eldeſt Daughter* the Eldeſt at the Time of the Violation is intended.

Ante, p. 116. 9. As it has been ſhewn, who is eldeſt Son and Heir of the King or Queen within the Meaning of the 25 *Ed.* 3. *ſt.* 5. *c.* 2. it is ſufficient in this Place to ſay, that the Violation of the Companion of ſuch eldeſt Son and Heir is High Treaſon.

3 Inſt. 9. H P. C. 13, 14. 1 Hawk. P. C. 38. 10. A Conſpiracy, although the Intention of the Conſpirators be to bring about the Violation of one of the Perſonages comprehended in this Clauſe, does not amount to an overt Act of violating; for as the Words thereof are *doth violate*, an actual Violation is neceſſary to the Completion of the Offence.

3 Inſt. 9, 10, 138. H. P. C. 14. Kel. 19. 1 Hawk. P. C. 38. 11. But if there have been a Conſpiracy to violate, and the intended Violation be afterwards perpetrated, the Conſpiracy is an overt Act of every one of the Conſpirators of violating; inaſmuch as there can be no Acceſſary in High Treaſon.

(F) Of levying War againſt the King.

1. BY the 25 *Ed.* 3. *ſt.* 5. *c.* 2. it is declared to be High Treaſon, "If a Man do levy War againſt our Lord the King in his Realm, "and thereof be provably attainted of overt Deed by People of his "Condition."

3 Inſt. 7. H. P. C. 12. 1 Hawk. P. C. 36. 2. Although this Clauſe does not mention a Queen Regnant, the Conſtruction has been, that ſuch a Queen is within the Meaning of the Words, *our Lord the King*.

1 H.H. P. C. 155. 3. As *Ireland*, although Part of the Dominions of the Crown of *England*, is not Part of the Realm of *England*, levying of War againſt the King in *Ireland* is not a levying of War againſt him *in his Realm*: But there are the ſame Laws, and ſome others, concerning High Treaſons in *Ireland*, as there are in *England*.

4. The Laws of *England* concerning High Treaſons are by the 7 *An. c.* 22 *par.* 1. expreſsly extended to *Scotland*: It being thereby enacted, "That ſuch Crimes and Offences, which are High Treaſon within *Eng-* "*land*, ſhall be conſtrued, adjudged and taken to be High Treaſon within "*Scotland*;" and conſequently levying War againſt the King in *Scotland* is High Treaſon within the Meaning of the 25 *Ed.* 3. *ſt.* 5. *c.* 2.

5. Every aſſembling of a Number of Men, although they are armed with Weapons offenſive and defenſive, is not ſuch a levying of War againſt the King as is within the Meaning of this Clauſe.

6. For it is by another Clauſe of the 25 *Ed.* 3. *ſt.* 5. *c.* 2. declared, "That "if any Man doth ride armed, openly or ſecretly, with a Number of armed "Men

" Men againſt any other, to ſlay him or to rob him, or to take and detain " him until he pay a Fine or a Ranſom for his Deliverance, it is not the " Intent of the King and his Council, that in this Caſe it be adjudged " High Treaſon; but that it be adjudged Felony or Treſpaſs, according " to the Law of the Land heretofore uſed, and according to what the " Caſe may require."

7. Although the Words of this Clauſe do extend only to the Caſes of a Number of Perſons armed being aſſembled with Intention to kill, rob or impriſon, the Equity thereof extends to all riſings, to aſſert a private Right; or to deſtroy particular Incloſures; or to remove a Nuſance which affected, or was thought to affect, in Point of Intereſt, the Perſons aſſembled; or to break Priſon, in order to relieve particular Perſons; becauſe every ſuch Offence, although it have a warlike Appearance, is not raiſed againſt the King or his Royal Majeſty, but for a Purpoſe of a private Nature. 1 H H P. C. 135, 149, 260. Foſt. 209, 210.

8. Five of the Judges were of Opinion, that the riſing of the Weavers in and about *London* to deſtroy all Engine-Looms, by the Uſe of which ſome Perſons were enabled to under ſell others who did not uſe ſuch Looms, did not amount to an overt Act of levying War againſt the King. The Affair was conſidered by thoſe Judges, and in my Opinion rightly, as a private Quarrel betwixt Men of the ſame Trade, concerning the Uſe of particular Engines, which was thought to be detrimental to thoſe concerned in the riſing. Five of the Judges were indeed of a different Opinion: But the Attorney-General thought proper to proceed againſt the Inſurgents as for a Riot only. Foſt. 210.

9. It has been holden by all the Judges, that it is lawful for all the King's Subjects to arm themſelves, without any ſpecial Commiſſion for ſo doing, in Order to ſuppreſs a Riot or a Rebellion. Poph. 121, 122. 2 And. 67.

10. If a Number of Men, armed with Weapons offenſive and defenſive, are aſſembled with a treaſonable Deſign, this is an overt Act in every one of them of levying War againſt the King, although Nothing further be done. 5 Stat. Tr. 37. Vaughan's Caſe. Salk. 635. S. C.

11. But the being in Company with ſuch as are guilty of levying War againſt the King is not, in all Caſes, an overt Act of ſuch levying War.

12. It was found by a ſpecial Verdict, that divers Perſons, who were in Company with thoſe who had levied War againſt the King, had joined them *pro timore mortis*. It was adjudged, that this was not an overt Act of levying War againſt the King; becauſe what they did was done for Fear of Death. 3 Inſt. 10.

13. It was found by a ſpecial Verdict, that a great Number of Perſons armed were aſſembled, under the Pretence of pulling down Bawdy-Houſes; that the Defendant was amongſt them throwing up his Cap, and hallowing with a Staff in his Hand; and that, whilſt he was amongſt them, he was knocked down by a Party of the King's Soldiers, who came to ſuppreſs them, and was then taken: But as the Verdict did not find any particular Act of Force committed by the Defendant, or that he was aiding or aſſiſting to the Reſt, the Judges all agreed, that this was not an overt Act of levying War againſt the King; becauſe it is poſſible that he might have been there only out of Curioſity. Kel. 73, 79. Green's Caſe. Ld. Raym. 1585.

14. But if a Man have attended one of the principal Perſons amongſt the Inſurgents, from the Beginning of an Inſurrection, this, although he was not privy to the Deſign, is an overt Act of levying War againſt the King. Moor 621, 622. Kel. 76, 77.

15. Every aſſembling of a Number of Men in a warlike Manner, to withſtand the King's lawful Authority, is an overt Act of levying War againſt the King. 3 Inſt. 9. 1 Hawk. P. C. 37.

16. The

Bro. Treaſ. pl. 24. 3 Inſt. 10. H. P. C. 14.

16. The defending of a Fort or Caſtle againſt the King's Forces is an overt Act of levying War againſt the King.

3 Inſt. 10.

17. An Inſurrection to raiſe the Price of Servants Wages, contrary to the Statute of Labourers, was holden by all the Judges to be an overt Act of levying War againſt the King: Becauſe the Offenders took upon themſelves the Reformation of the Law, which Subjects by the gathering of Power ought not to do.

3 Inſt. 9. 2 And. 4.

18. It is in two Books laid down generally, that if a Number of Men aſſemble in a warlike Manner, in order to deliver Men out of Priſons, this is an overt Act of levying War againſt the King.

Kel. 75, 77. 1 Ventr. 251.

19. In other Books it is laid down, that an Inſurrection with a Deſign to break open one Gaol and ſet the Priſoners therein at Liberty, is not an overt Act of levying War againſt the King, but that an Inſurrection with a Deſign to break all Priſons, and ſet all Priſoners at Liberty, is.

3 Inſt. 9, 10. Poph. 122. Kel. 76, 77. 1 Hawk. P. C. 37.

20. Every aſſembling of a Number of Men in a warlike Manner, with an Intention to reform the Government or the Law, is an overt Act of levying War againſt the King.

Moor 621. Earl of Eſſex's Caſe.

21. The Earl of *Eſſex* went from his Houſe with a Number of armed Men into the City of *London*, and prayed the Aſſiſtance of the Citizens to force his Way to the Queen, in Order to remove his Enemies from her Perſon. This was adjudged an overt Act of levying War againſt the Queen.

Cro. Car. 589. Benſted's Caſe.

22. A Number of Perſons armed in a warlike Manner went to *Lambeth* Houſe with a Deſign to ſeize the Archbiſhop of *Canterbury*, who was one of his Majeſty's Privy Counſellors. This was holden to be an overt Act of levying War againſt the King.

3 Inſt. 9. H. P. C. 14. Poph. 122. 1 Hawk. P. C. 37.

23. An Inſurrection, with an Intention to alter the Religion eſtabliſhed by Law, is an overt Act of levying War againſt the King.

3 Inſt. 9. H. P. C. 14. Kel. 71. Sid. 358. 1 Hawk. P. C. 37.

24. Every aſſembling of a Number of Men in a warlike Manner, with a Deſign to redreſs a publick Grievance, is an overt Act of levying War againſt the King: Becauſe this, it being an Attempt to do that by private Authority which only ought to be done by the King's Authority, is an Invaſion of the Royal Prerogative.

Kel. 71. Sid. 358.

25. An Inſurrection with a Deſign to pull down all Bawdy-Houſes was holden to be an overt Act of levying War againſt the King.

3 Inſt. 10. H. P. C. 14. 1 Hawk. P. C. 37.

26. If a Number of Men aſſemble in a warlike Manner; with a Deſign to throw down all Incloſures, this is an overt Act of levying War againſt the King.

3 Inſt. 10. H. P. C. 14. 1 Hawk. P. C. 37.

27. But if a Number of Men armed in a warlike Manner are aſſembled with an Intention of only throwing down a particular Incloſure, by which they are prevented from enjoying a Right of Common, this may amount to a Rout or Riot: But it is not an overt Act of levying War againſt the King; becauſe the Deſign in this Caſe is the Redreſs of a private Grievance.

3 Inſt. 9. H. P. C. 13, 14. 1 Hawk. P. C. 38.

28. As the Words of this Clauſe are *do levy War*, a Conſpiracy with an Intention to levy War againſt the King does not amount to an overt Act of levying War againſt him.

3 Inſt. 9, 10, 138. H. P. C. 14. Kel. 19. 1 Hawk. P. C. 38.

29. But if there have been ſuch Conſpiracy, and War be afterwards levied, the Conſpiracy is in every one of the Conſpirators an overt Act of levying War againſt the King, inaſmuch as there can be no Acceſſary in High Treaſon.

(G) Of adhering to the King's Enemies.

1. BY the 25 *Ed.* 3. *ſt.* 5. *c.* 2. it is declared to be High Treaſon, "If a Man be adherent to the Enemies of our Lord the King in "the Realm giving to them Aid or Comfort in his Realm, or elſewhere; "and thereof is provably attainted of overt Deed by People of his Con- "dition."

2. A Queen Regnant is not mentioned in this Clauſe: But the Conſtruction has been, that ſuch a Queen is within the Meaning of the Words, *our Lord the King*. 3 Inſt. 7. H. P. C. 12. 2 Hawk. P. C. 36.

3. The Word Enemies in this Clauſe is not confined to the Subjects of a State at War with the King; for if any of the Subjects of a State in Amity with the King have commenced, or have made Preparations for the commencing of Hoſtilities againſt the King, theſe are his Enemies.

4. If any Subjects of a State in Amity with the King are in the Service of a State at War with the King, the giving Aid or Comfort to theſe is adhering to the King's Enemies; for they are to be conſidered by all States, except that of which they are Subjects, as the Subjects of the State in whoſe Service they are. Salk. 635. Vaughan's Caſe.

5. It was holden, that the *Scots* who invaded the Realm in the Reign of Queen *Elizabeth* were the Queen's Enemies within the Meaning of this Clauſe; although there was at that Time no War betwixt *England* and *Scotland*. Duke of Norfolk's Caſe. 1 H. H. P. C. 164.

6. If the *French* King ſhould, in Time of Peace, ſend an Army to one of the Sea Ports of *France*, with a Deſign to invade any Part of the King's Dominions, every *French* Subject in that Army would be one of the King's Enemies. 5 Stat. Tr. 37. Vaughan's Caſe.

7. It has been holden, that adhering to the Subjects of a State at War with the King, againſt the King's Allies, is an adhering to the King's Enemies. Salk. 635. Vaughan's Caſe. 1 Hawk. P. C. 38.

8. Aiding or comforting the King's Subjects, who have levied War againſt him, makes the Perſon who does this a Principal in the High Treaſon of levying War againſt the King: But it is not an Adherence to the King's Enemies; becauſe ſuch Subjects are not Enemies but Traitors. 3 Inſt. 11. H. P. C. 14. 115. 1 Hawk. P. C. 34. 3 Inſt. 11.

9. The giving of any Kind of Aid or Comfort to the King's Enemies is an overt Act of adhering to them. 3 Inſt. 10. H. P. C. 14. 1 Hawk. P. C. 38.

10. If a Caſtle belonging to the King be ſurrendered for Reward to his Enemies, this is an overt Act of adhering to them. Ibid.

11. The inliſting of a Man, and ſending him into the Service of a State at War with the King, is an overt Act of adhering to the King's Enemies. 2 Ventr. 31. Harding's Caſe.

12. If one of the King's Subjects be enliſted into the Service of a State at War with the King, and march, this is an overt Act of adhering to the King's Enemies. Salk. 635. Vaughan's Caſe.

13. If a Man take a Commiſſion, to cruiſe in one of the Ships of a State at War with the King againſt the King's Ships, or againſt the Ships of his Subjects. 5 Stat. Tr. 37. Vaughan's Caſe. Salk. 635.

Subjects or Allies, and go on Board the Ship, this is an overt Act of adhering to the King's Enemies; although he never commit any Act of Hostility.

1 H. H. P. C. 165. 14. But if one of the King's Subjects do reside in a State at War with the King, without giving any Assistance to the carrying on of the War, this is not an overt Act of adhering to the King's Enemies.

MS. Rep. Hensey's Case, Trin 31 G. 2. 15. In a very late Case, it was insisted for the Defendant, at a Trial at Bar, that sending Letters of Advice or Intelligence to the Subjects of a State at War with the King is not an overt Act of adhering to the King's Enemies.

16. And from the 2 & 3 *Ann. c.* 20. *par.* 34. By which it is enacted, "That if any Officer or Soldier in her Majesty's Army shall give Advice "or Intelligence to any Enemy of her Majesty, either by Letters, Mes- "sages, Signs or Tokens, or in any Way whatsoever, such Person shall "be adjudged guilty of High Treason," it was inferred, that if the giving of such Intelligence had before been an overt Act in every Subject of adhering to the King's Enemies, it was unnecessary to enact by a new Statute, that the doing thereof should be High Treason in an Officer or Soldier.

17. But the Judges of the Court of King's Bench were clearly of Opinion, that the sending of such Letters is an overt Act of adhering to the King's Enemies; and it was said, that the same had been holden by all the Judges in *Gregg*'s Case, which was subsequent to the Statute of the 2 & 3 *Ann. c.* 20.

18. It was likewise resolved in this Case, that the sending of such Letters, although they were intercepted at the Post-Office, and did not go, is an overt Act of adhering to the King's Enemies; and it was said, that the same had been holden by all the Judges in *Gregg*'s Case.

3 Inst. 9. H. P. C. 13, 14. 1 Hawk. P. C. 38. 19. A Conspiracy, with an Intention to give Aid or Comfort to the King's Enemies, does not amount to an overt Act of adhering to the King's Enemies; for as the Words of this Clause are *be adherent*, an actual Adherence is necessary to the Completion of the Offence.

3 Inst. 9, 10, 138. H. P. C. 14. Kel. 19. 1 Hawk. P. C. 38. 20. But if there have been such Conspiracy, and Aid or Comfort be afterwards given, the Conspiracy is an overt Act in every one of the Conspirators of adhering to the King's Enemies, inasmuch as there can be no Accessary in High Treason.

(H) Of counterfeiting the Great Seal, Privy Seal, Privy Signet or Sign Manual.

1. BY the 25 *Ed.* 3. *st.* 5. *c.* 2. it is declared to be High Treason, "If "a Man counterfeit the King's Great or Privy Seal."

2. By the 1 *Mar. st.* 5. *c.* 6. *par.* 2. it is enacted, "That if any Person "doth falsely forge or counterfeit the Queen's Sign Manual or Privy Signet, "every such Offence shall be deemed and adjudged High Treason."

3. And by the 7 *Ann. c.* 21. *par.* 9. it is enacted, "That if any Person "shall counterfeit her Majesty's Seals, appointed by the Twenty-fourth "Article of the Union to be kept, used and continued in *Scotland*, that "the doing thereof shall be construed and adjudged to be High "Treason."

4. It

4. It is not a counterfeiting within the Meaning of any of these Statutes, unless the counterfeit Thing resemble the Thing counterfeited. 3 Inst. 15. 1 H H.P.C. 181.

5. But it is not necessary, that there should be an exact Resemblance between the Thing counterfeited and the counterfeit Thing.

6. A Person had counterfeited the Privy Seal: But, that there might be some Differences between the Counterfeit and the true Privy Seal, he had with Design left out the Crown; and he had also left out some Letters and inserted others in their Stead. This, notwithstanding the Differences, was holden to be a counterfeiting of the Privy Seal. 2 Roll. Rep. 50. Robinson's Case. 1 H H.P.C. 184.

7. It is said, that the engraving of a Seal, which resembles the Great Seal, without a Warrant from the King, does not seem to be a counterfeiting of the Great Seal, within the Meaning of the 25 *Ed.* 3. *st.* 5. c. 2. unless an Impression of the engraved Seal be affixed to some Instrument. 1 H.H.P.C. 185.

8. And *Hale* Chief Justice, in speaking of this, mentioned the Case of making a Tool or Instrument for coining Money, which at the Time he wrote was not High Treason, unless some counterfeit Money had been actually coined therewith. Ibid.

9. But as these Cases are not similar, the Words of the Statute being in the one Case *doth counterfeit the King's Great Seal*, in the other *doth counterfeit the King's Money*, the Case mentioned does not conclude to the Point.

10. It is in one Case said, that where a Man had affixed an Impression of a Counterfeit Privy Seal to a Patent, and had afterwards obtained the Great Seal to be affixed to the Patent, and collected Money by Virtue thereof, this was, upon the whole Circumstances of the Case, adjudged to be a counterfeiting of the Privy Seal. 2 Roll. Rep. 50. Robinson's Case.

11. But it seems to be the better Opinion, that counterfeiting an Impression of any one of the three Seals, or the Sign Manual, is High Treason, although no improper Use be made of the counterfeit Thing.

12. The Statutes, which prohibit the counterfeiting of any one of these Seals, or the Sign Manual, are entirely silent as to the Use that may be made of the counterfeit Thing.

13. In one Book of the best Authority the counterfeiting of an Impression of any one of these Seals, or the Sign Manual, is, without saying any Thing further, laid down to be High Treason. 1 H.H.P.C. 184.

14. And in the Case of counterfeiting the King's Money, the counterfeiting has been holden to be High Treason, although the counterfeit Money were not uttered. Bro. Treas. pl. 27. 3 Inst. 16. 1 H.H P.C. 214. 1 Hawk. P. C. 42.

15. It has been holden, that the counterfeiting of a Great Seal, which has not for some Time been made Use of, is High Treason. 1 H H.P.C. 177.

16. At the Common Law a Misuse or an Abuse of the Great Seal was in some Cases High Treason.

17. If the Chancellor had affixed the Great Seal to an Instrument without the proper Warrant for so doing, this would at the Common Law have been High Treason: Because it was a Misuse of the Great Seal. 3 Inst. 15, 16. H. P. C. 18.

18. If a Man, after stealing or finding the Great Seal, had affixed it to an Instrument, this, it being an Abuse of the Great Seal by a Person who never had Authority to use it, would at the Common Law have been High Treason. 3 Inst. 16.

19. But neither a Misuse nor an Abuse of the Great Seal is since the 25 *Ed.* 3. *st.* 5. *c.* 2. High Treason; because there is not in either Case a counterfeiting thereof. 3 Inst. 15, 16. H. P. C. 18.

20. The

3 Inſt. 15. Kel. 80. 1 Hawk. P. C. 41.

20. The making of any Alteration in, or Addition to, what is contained in an Inſtrument, after the Great Seal has been thereto affixed, is not High Treaſon; becauſe this is only an Abuſe of the Great Seal.

3 Inſt. 15, 16. H.P.C. 18. Kel. 80. 1 Hawk. P. C. 41.

21. It is not for the ſame Reaſon High Treaſon, to take the Wax, which has been impreſſed with the Great Seal from one Inſtrument, and affix it to another.

3 Inſt. 15. 1 Hawk. P. C. 41.

22. An Intent, or an Attempt, to counterfeit one of the three Seals, or the Sign Manual, is not High Treaſon; for, as the Words of the Statute are *doth counterfeit*, the Offence is not complete unleſs there be an actual counterfeiting.

3 Inſt. 16, 138. H.P.C. 14, 18. Kel. 19. 1 Hawk. P. C. 56, 41.

23. But if any one of theſe Seals or the Sign Manual has been counterfeited, every Perſon, who was aiding in or conſenting to the counterfeiting, is guilty of High Treaſon; inaſmuch as there can be no Acceſſary in High Treaſon.

(I) Of counterfeiting or diminiſhing the Money current.

1. BY the 25 *Ed.* 3. *ſt.* 5. *c.* 2. it is declared to be High Treaſon, "If "a Man doth counterfeit the King's Money."

2 Inſt. 577. 1 Hawk. P. C. 42.

2. It is laid down, that the Words *the King's Money*, in this Clauſe, do only mean ſuch Gold and Silver Coins as are coined within the Realm.

3. It ſeems from a late Tranſaction, that the counterfeiting of Money, after a Stop has been put to the Currency thereof, is not a counterfeiting within the Meaning of this Clauſe.

4. The Currency of the Gold Coins called *Broad Pieces* was put a Stop to, by a Proclamation bearing Date the twenty-firſt Day of *February* One thouſand ſeven hundred and thirty-two; and by the ſame Proclamation the Collectors and Receivers of the Revenue Tax or Taxes were commanded to receive ſuch broad Pieces, for and during the Space of one Year from the Date thereof, at the Rate of four Pounds one Shilling *per* Ounce Troy, in all Payments on Account of the Revenue Tax or Taxes.

5. By the 6 *Geo.* 2. *c.* 26. which Statute was made very ſoon after this Proclamation, it was enacted, "That if any Perſon, ſhall on or before "the twenty-firſt Day of *February* One thouſand ſeven hundred and thirty-"three, forge or counterfeit any of the Gold Coins called *Broad Pieces*, "every ſuch Offender ſhall be adjudged guilty of High Treaſon."

6. This ſeems to be a legiſlative Declaration, that the forging or counterfeiting of the King's Money coined within the Realm, after a Stop is put to the Currency thereof, is not High Treaſon within the 25 *Ed.* 3. *ſt.* 5. *c.* 2. for if it be ſo, there was no need to make it ſo in this particular Caſe by an expreſs Statute.

1 Hawk. P. C. 43.

7. A counterfeiting of the King's Money in *Ireland*, or in any other Place ſubject to the *Britiſh* Crown, is a counterfeiting withing the Meaning of the 25 *Ed.* 3. *ſt.* 5. *c.* 2.

8. If

8. If a Perſon, employed by the King in coining, coin Money of leſs Weight than it ought to be, or with more Alloy in it than there ought to be, this is a Counterfeiting of the King's Money within the Meaning of the 25 *Ed.* 3. *ſt.* 5. *c.* 2. 3 Inſt. 16, 17. Bro. Treaſ. pl. 19. 1 Hawk. P. C. 42.

9. By the 1 *Mar. ſt.* 2. *c.* 6. it is enacted, "That if any Perſon or "Perſons ſhall falſely forge and counterfeit any ſuch Coin of Gold or Sil- "ver, as is not the proper Coin of this Realm, and is or ſhall be current "within this Realm by the Conſent of the Queen, her Heirs or Succeſſors, "every ſuch Offence ſhall be deemed and adjudged High Treaſon."

10. By a Clauſe in this Statute it is expreſsly enacted, "That the "Counſellors, Procurers, Aiders and Abettors, of the Perſon or Perſons "guilty of the Offence thereby made High Treaſon, ſhall be deemed and "adjudged guilty of High Treaſon."

11. And there is in all ſubſequent Statutes, which make any Offence relating to Money High Treaſon, a Clauſe to the ſame Effect.

12. But all theſe Clauſes ſeem to be rather *ex abundanti Cautela* or *in Terrorem* than *ex Neceſſitate*.

13. It was indeed holden in one old Caſe, that the receiving and aiding of a Man after he had been guilty of counterfeiting the King's Money is not High Treaſon. Dyer 296. Conier's Caſe. Mich. 12 El.

14. But it is in divers Books laid down, that ſuch receiving and aiding does as well make the Perſon guilty thereof a Principal in this, as in any other Species of High Treaſon. 3 Inſt. 138. H. P. C. 127, 215. 2 Hawk. P. C. 310.

15. And it was reſolved at the *Old-Bailey*, by all the Judges preſent, that the uttering of counterfeit Money, by a Perſon who knew the Counterfeiter thereof, is High Treaſon; becauſe it is an aiding after the Fact. Kel. 33. Clark's Caſe, 31 Aug. 16 Car. 2.

16. By the 5 *El. c.* 11. *par.* 2. it is enacted, "That, from and after "the fifth Day of *May* next coming, clipping, waſhing, rounding or filing, "for wicked Lucre or Gain's Sake, of any of the proper Monies or Coins "of this Realm or the Dominions thereof, or of the Monies or Coins of "any other Realm, allowed to be current within this Realm or the Do- "minions thereof at this preſent; or that hereafter ſhall be the lawful "Monies or Coins of this Realm or the Dominions thereof, or of any "other Realm, and by Proclamation allowed to be current here by the "Queen's Majeſty her Heirs or Succeſſors; ſhall be taken, deemed and "adjudged by Virtue of this Act to be High Treaſon."

17. By the 18 *El. c.* 1. *par.* 1. after reciting that, ſince the making of the Statute of the fifth Year of her Majeſty's Reign, divers evil diſpoſed Perſons, knowing that the ſaid Law ought to be expounded ſtrictly according to the Words thereof, and that like Offences ought not by any Equity to receive the like Puniſhments, have deviſed Arts for the diminiſhing of Monies and Coins, to the Loſs as well of her Majeſty as of her Subjects, it is enacted, "That if any Perſon ſhall, from and after the fifth Day of *May* "next coming, for wicked Lucre and Gain-ſake, by any Art, Way, or "Means whatſoever, impair, diminiſh, falſify, ſcale or lighten, the proper "Monies or Coins of this Realm or any the Dominions thereof, or the "Monies or Coins of any other Realm, allowed to be current at the Time "of the Offence committed within this Realm or any of the Dominions of "the ſame, by the Proclamation of the Queen's Majeſty, her Heirs or Suc- "ceſſors; every ſuch Offence ſhall be taken, adjudged and deemed, to be "High Treaſon."

18. By the 8 & 9 *W.* 3. *c.* 26. *par.* 7. after reciting, that notwithſtanding the Laws in Force againſt counterfeiting the Monies and Coins of this Realm this Offence doth daily increaſe, it is enacted, "That, from and "after

" after the 15th Day of *May* One thouſand ſix hundred and ninety-ſeven, " no Smith, Engraver, Founder, or other Perſon or Perſons whatſoever " (other than and except the Perſons employed or to be employed in or for " his Majeſty's Mint or Mints, in the Tower of *London* or elſewhere, and " for the Uſe and Service of the ſaid Mints only; or Perſons lawfully " authorized by the Lords Commiſſioners of the Treaſury, or Lord High " Treaſurer, for the Time being) ſhall knowingly make or mend, or " begin or proceed to make or mend, or aſſiſt in the making or mend- " ing, of any Puncheon, Counter-Puncheon, Matrix, Stamp, Dye, " Pattern or Mould, of Steel, Iron, Silver or other Metal or Metals, or " of Spaud, fine Founders Earth, Sand, or any other Materials whatſo- " ever, in or upon which there ſhall be, or be made or impreſſed, or " which will make or impreſs, the Figure, Stamp, Reſemblance or Simi- " litude, of both or either of the Sides or Flats of any Gold or Silver " Coin current within this Kingdom; nor ſhall knowingly make or mend, " or begin or proceed to make or mend, or aſſiſt in the making or mend- " ing, of any Edger or Edging Tool, Inſtrument or Engine, not of com- " mon Uſe in any Trade, but contrived for marking of Money round the " Edges with Letters, Grainings or other Marks or Figures, reſembling " thoſe on the Edges of Money coined in his Majeſty's Mint, nor any Preſs " for Coinage, nor any cutting Engine for cutting round Blanks by Force " of a Screw out of flatted Bars of Gold, Silver or other Metal; nor ſhall " knowingly buy or ſell, hide or conceal, or without lawful Authority or " ſufficient Excuſe for that Purpoſe knowingly have in his, her or their " Houſes, Cuſtody or Poſſeſſion, any ſuch Puncheon, Counter-Puncheon, " Matrix, Stamp, Dye, Edger, cutting Engine, or other Tool or Inſtru- " ment, before mentioned; and if any Smith, Engraver, Founder or other " Perſon or Perſons whatſoever, (other than and except as aforeſaid) " ſhall offend in any of the Matters or Things aforeſaid, then all and " every ſuch Offender and Offenders ſhall be and is and are hereby ad- " judged to be guilty of High Treaſon."

19. By *par.* 2. it is enacted, " That if any Perſon or Perſons whatſo- " ever, from and after the ſaid fifteenth Day of *May*, ſhall, without lawful " Authority for that Purpoſe, wittingly or knowingly convey or aſſiſt in con- " veying out of his Majeſty's Mint in the *Tower* of *London*, or out of any " other of his Majeſty's Mint, any Puncheon, Counter-Puncheon, " Matrix, Dye, Stamp, Edger, cutting Engine, Preſs or other Tool, " Engine or Inſtrument, uſed for or about the coining Monies there, or " any uſeful Part of ſuch Tools or Inſtruments, that then as well the " ſaid Perſon and Perſons ſo offending, as alſo all and every Perſon and " Perſons knowingly receiving, hiding or concealing the ſame, ſhall be, " and is and are hereby adjudged to be guilty of High Treaſon."

20. By *par.* 3. it is enacted, " That if any Perſon or Perſons (other " than the Perſons employed in his Majeſty's Mint or Mints, or ſuch as " ſhall have Authority from the Lords Commiſſioners of the Treaſury or " the Lord High Treaſurer for the Time being) ſhall, after the ſaid fif- " teenth Day of *May*, mark on the Edges any of the current Coin of this " Kingdom; or if any Perſon or Perſons whatſoever ſhall mark on the " Edges any of the diminiſhed Coin of this Kingdom, or any counterfeit " Coin reſembling the Coin of this Kingdom, with Letters or Grainings, " or other Marks or Figures, like unto thoſe on the Edges of Money " coined in his Majeſty's Mint; every ſuch Offence ſhall be and is hereby " adjudged to be High Treaſon."

21. By *par.* 4. it is enacted, " That if any Perſon or Perſons whatſoever, " after the ſaid 15th Day of *May*, ſhall colour, gild or caſe over, with " Gold or Silver, or with any Waſh or Materials producing the Colour of " Gold or Silver, any Coin reſembling any of the current Coin of this

" Kingdom,

" Kingdom, or any round Blanks of baſe Meal, or of coarſe Gold or " Silver, of a fit Size and Figure to be coined into counterfeit milled Mo- " ney, reſembling any of the Gold or Silver Coin of this Kingdom; or if " any Perſon or Perſons ſhall gild over any Silver Blanks, of a fit Size to " be coined into Pieces reſembling the current Gold Coin of this King- " dom; all and every ſuch Perſon and Perſons ſo offending ſhall be, and " is and are hereby, adjudged to be guilty of High Treaſon."

22. By the 15 *Geo.* 2. *c.* 28. *par.* 1. it is enacted, " That if any Perſon " whatſoever ſhall, after the twenty-ninth Day of *September* One thouſand " ſeven hundred and forty-two, waſh, gild or colour, any of the lawful " Silver Coin called a *Shilling* or a *Sixpence*, or any counterfeit or falſe " Shilling or Sixpence, or add to or alter the Impreſſion, or any Part of " the Impreſſion, of either Side of ſuch lawful or counterfeit Shilling or " Sixpence, with Intent to make ſuch Shilling reſemble, look like or paſs " for, a Piece of lawful Gold Coin called a *Guinea*; or with Intent to " make ſuch Sixpence reſemble, look like or paſs for, a Piece of lawful " Gold Coin called a *Half Guinea*; or ſhall file, or any Ways alter, waſh " or colour, any of the Braſs Monies called *Halfpennies* or *Farthings*, or " add to or alter the Impreſſion, or any Part of the Impreſſion, of either " Side of a Halfpenny or Farthing, with Intent to make a Halfpenny re- " ſemble, look like or paſs for, a lawful Shilling; or with Intent to make " a Farthing reſemble, look like or paſs for a lawful Sixpence; the Perſon " or Perſons ſo offending, in any of the Matters aforeſaid, ſhall be, and is " and are hereby, adjudged to be guilty of High Treaſon."

23. It ſeems to have been always the better Opinion, that only Gold or Silver Coins are the King's Money within the Meaning of the 25 *Ed.* 3. *ſt.* 5. *c* 2. 2 Inſt. 577. 1 Hawk. P. C. 42.

24. Some Doubt ſeems formerly to have been entertained, whether the counterfeiting of Copper Money, made current by Proclamation, were not High Treaſon. 1 H. H. P. C. 211.

25. In order to remove all Doubt concerning this Matter, it is by the 15 *Geo.* 2. *c.* 28. *par.* 6. declared, " that the coining or counterfeiting any " of the Copper Money of this Kingdom is only a Miſdemeanor."

26. It has already been obſerved, that the counterfeiting of the Great Seal is not High Treaſon, unleſs the Counterfeit Seal be like the true Great Seal. Ante, p. 123.

27. There ſeems to be equal Reaſon to hold, that the counterfeiting of Money is not High Treaſon, unleſs the counterfeit Money be like the true Money: For the Word *Counterfeit* implies a Likeneſs; and if there be not a Likeneſs, there is very little Danger of Impoſition or Fraud from the counterfeit Money.

28. It is moreover ſaid in one Book, that it is a counterfeiting within the Meaning of the 25 *Ed.* 3. *ſt.* 5. *c.* 2. although the counterfeit Money be not exactly like the true Money; from whence it may fairly be inferred, that a Likeneſs is neceſſary. 1 H. H. P. C. 215.

29. And that Clauſe of the 25 *Ed.* 3. *ſt.* 5. *c.* 2. which makes it High Treaſon to bring counterfeit Money into the Realm, has in it theſe Words *counterfeit to the Money of* England.

30. The counterfeiting of Money is High Treaſon, although the ſame be not uttered; for neither the 25 *Ed.* 3. *ſt.* 5. *c.* 2. nor any other of the Statutes does make uttering a Part of the Offence. Bro. Treaſ. pl. 27. 3 Inſt. 16. 1 H. H. P. C. 214. 1 Hawk. P. C. 42.

31. The uttering of counterfeit Money was heretofore only a Miſdemeanor, although the Perſon, who uttered ſuch Money, knew it to be counterfeit. H. P. C. 127. Kel. 33. 1 Hawk. P. C. 42.

32. But

32. But by the 15 *Geo.* 2. *c.* 28. this Offence is in ſome Caſes made Felony.

(K) Of bringing counterfeit Money into the Realm.

1. BY the 25 *Ed.* 3. *ſt.* 5. *c.* 2. it is declared to be High Treaſon, "If a Man bring falſe Money into this Realm, counterfeit to the "Money of *England*, as the Money called *Luſhburgh*, or other like to "the ſaid Money of *England*, knowing the Money to be falſe, to mer- "chandize or make Payment, in Deceit of our Lord the King and of his "People."

2. By the 1 & 2 *Ph. & Mar. c.* 11. after reciting that many ill diſpoſed Perſons have of late brought into this Realm, from Parts beyond the Seas, forged and counterfeit Money, like to ſuch Coins of Gold and Silver of other Realms, as by the Conſent of the King and Queen our Sovereign Lord and Lady are allowed to be current within this Realm; and have uttered the ſame here by merchandizing and otherwiſe; becauſe the ſaid ill diſpoſed Perſons have perceived, that there is not any ſufficient Law provided for the condign Puniſhment of Offenders in that Behalf, it is enacted, "That if any Perſon or Perſons, after the twentieth Day of *Ja-* "*nuary* next coming, ſhall bring from the Parts beyond the Sea into this "Realm, or into any of the Dominions of the ſame, any ſuch falſe and "counterfeit Coin or Money, being current within this Realm as is afore- "ſaid, knowing the ſame Coin or Money to be falſe or counterfeit, to the "Intent to utter or make Payment with the ſame, within this Realm or "any the Dominions of the ſame, by merchandizing or otherwiſe; that "all and every ſuch Perſon or Perſons ſo offending ſhall be deemed and "adjudged to be Offenders in High Treaſon."

3. Bringing of counterfeit Money into the Realm is not within the Meaning of theſe Statutes, unleſs it be like either the Money of *England*, or like ſuch Money of other Realms as is current within this Realm.

1 H. H. P. C. 184, 214. 4. But it is not neceſſary, that the counterfeit Money ſhould be exactly like the true Money.

3 Inſt. 18. H. P. C. 21. 1 Hawk. P. C. 43. 5. The counterfeit Money muſt, in Order to conſtitute this Offence, be brought from a foreign Nation, and not from any Place ſubject to the *Engliſh* Crown; for, although every ſuch Place is to many Purpoſes diſtinct from the Realm, and conſequently a bringing into the Realm from ſuch a Place would be a bringing into the Realm within the Letter of the 25 *Ed.* 3. *ſt.* 5. *c.* 2. or the 1 & 2 *Ph. & Mar. c.* 11. the Conſtruction has been, that the bringing of counterfeit Money from *Ireland*, or any Place ſubject to the *Engliſh* Crown, into *England*, is not ſuch a Bringing into the Realm, as is within the Meaning of either of theſe Statutes.

3 Inſt 18. 6. It is laid down in one Book, that the bringing of counterfeit Money into the Realm from a foreign Nation is not High Treaſon; unleſs there be a Merchandizing with, or a Payment of the Money.

1 H. H. P. C. 229. 1 Hawk. P. C. 43. 7. In other Books it is laid down, that as an actual Merchandizing with or Payment of the Money is not made Part of the Offence by the 25 *Ed.* 3. *ſt.* 5 *c.* 2. or by the 1 & 2 *Ph. & M. c.* 11. the bringing of counterfeit Money into the Realm, with an Intention to merchandize therewith or make Payment thereof, is High Treaſon; and that the bringing of it in is Evidence of ſuch Intent.

8. The former, however, ſeems to be the better Opinion.

9. For in the 25 *Ed.* 3. *ſt.* 2. *c.* 5. the Words are *doth bring falſe Money into this Realm, counterfeit to the Money of* England, *to merchandize or make Payment*; which ſeem to imply, that there may be a Bringing of counterfeit Money into the Realm, without an Intention to merchandize or make Payment; and if ſo, it would be a very hard Conſtruction to hold, that the Bringing in is in itſelf Evidence of ſuch Intention.

10. And in the 1 & 2 *Ph. & M. c.* 11. the *Uttering of counterfeit Money*, brought from a foreign Realm, *here by merchandizing and otherwiſe* is recited as Part of the Miſchief, which is by that Statute intended to be remedied.

11. The uttering of counterfeit Money brought into the Realm from a foreign Realm is not High Treaſon, unleſs it be uttered by the Perſon who brought it in; the bringing of it into the Realm being only made High Treaſon. 3 Inſt. 18. H. P. C. 21. 1 Hawk. P. C. 43.

(L) Of ſlaying certain Officers.

1. BY the 25 *Ed.* 3. *ſt.* 5. *c.* 2. it is declared to be High Treaſon, "If "a Man ſlay the Chancellor, Treaſurer, or any Juſtice of our "Lord the King of the one Bench or of the other, a Juſtice in Eyre or of "Aſſize, and all other Juſtices aſſigned to hear and determine, being in "their Places doing their Offices."

2. The Conſtruction has been, that this Clauſe does not extend to any Officers, except thoſe which are therein expreſsly mentioned. 3 Inſt. 18. H. P. C 17. 1 Hawk. P. C. 41.

3. It has been holden, that the wounding of one of the Officers mentioned in this Clauſe, while he is in the Execution of his Office, is not High Treaſon, unleſs Death enſue. 3 Inſt. 18. H. P. C. 17. 1 Hawk. P. C. 41.

4. By the 7 *Ann. c.* 21. *par.* 8. It is enacted, "That if any Perſon "ſhall, after the firſt Day of *July* One thouſand ſeven hundred and nine, "ſlay any of the Lords of the Seſſion, or of the Lords of Juſticiary, ſitting in Judgment in the Exerciſe of their Office within *Scotland*, the "doing thereof ſhall be conſtrued, adjudged and taken to be High "Treaſon."

(M) Of extolling or maintaining the Power of the See of Rome.

1. BY the 5 *El. c.* 1. *par.* 2. it is enacted, "That if any Perſon or "Perſons, inhabiting or reſident within this Realm, or within any "other Part of the Queen's Dominions, after the firſt Day of *April* One "thouſand five hundred and ſixty-three, ſhall by Writing, Cyphering, "Printing, Preaching or Teaching, adviſedly and wittingly extol, maintain "or defend, the Authority, Juriſdiction or Power, of the Biſhop of *Rome*, "heretofore

" heretofore claimed, uſed or uſurped, within this Realm, or in any " Country under the Queen's Obeyſance; or by any Speech, open Deed " or Act, adviſedly and wittingly attribute any ſuch Juriſdiction, Autho- " rity or Preheminence, to the ſaid See of *Rome* or to any Biſhop of the " ſame, within this Realm, or in any the Queen's Dominions; that then " every ſuch Perſon or Perſons, ſo offending, ſhall incur the Dangers, " Penalties, Pains and Forfeiture, of the Statute of *Præmunire*."

2. And by *par.* 10. it is enacted, " That if any ſuch Offender, after " ſuch Conviction and Attainder as is aforeſaid, do eftſoons commit, or " do the ſaid Offences, or any of them, in Manner and Form aforeſaid, " and be thereof duly convicted and attainted, he ſhall for the ſecond Of- " fence forfeit and ſuffer as in Caſes of High Treaſon."

Dyer 282. 3. It has been holden, that if a Man write a Book in Defence of the Pope's Juriſdiction within this Realm, and afterwards publiſh it, he is liable to the Penalties of this Statute.

Ibid. 4. It has been alſo holden, that if one Man, knowing the Purport of a Book of this Kind which was written beyond the Seas, bring it over, and ſecretly ſell it, and another, having read or heard the Contents thereof, commend it, they are both liable to the Penalties of this Statute.

Ibid. 5. But if a Man, who has heard the Contents of ſuch a Book, do only buy and read it, he is not liable to the Penalties of this Statute.

Sav. 46. Slade's Caſe. 6. A Defendant, who had been convicted of an Offence againſt this Statute, and had received Judgment for the ſame, being aſked by *Manwood* Chief Baron, whether he were ſtill of the ſame Opinion? Anſwered, that he was. It was holden at a Meeting of the Judges, that by this Anſwer he became guilty of *adviſedly and wittingly* maintaining the Pope's Power a ſecond Time.

7. But two of the Judges were of Opinion, that theſe Words, which were ſpoken in Anſwer to a Queſtion put by the Chief Baron, did not amount to a maintaining of the Pope's Power *adviſedly and wittingly* a ſecond Time.

(N) Of refuſing a ſecond Time to take the Oath of Supremacy.

1. BY the 1 *El. c.* 1. *par.* 19. it is enacted, " That every Archbiſhop, " Biſhop, and every other Eccleſiaſtical Perſon, Officer and " Miniſter; and every Temporal Judge, Juſtice, Mayor, and every " other Temporal Officer and Miniſter, and every other Perſon receiving " your Highneſs's Fee or Wages, within this Realm or any your High- " neſs's Dominions, ſhall take the Oath of Supremacy therein ſet " forth."

2. By *par.* 20. it is enacted, " That if any ſuch Perſon ſhall obſtinately " refuſe to take the ſame, he ſhall forfeit during his Life every Spiritual " Promotion, Benefice and Office, and every Temporal Promotion and Office, which he hath ſolely at the Time of ſuch Refuſal."

3. By the 5 *El. c.* 1. *par.* 5. it is enacted, " That all Perſons, who ſhall " take Holy Orders, or who ſhall be promoted to any Degree of Learning in " any Univerſity, within this Realm or the Dominions to the ſame belong- " ing; all Schoolmaſters or Teachers of Children; all Benchers, Readers,

" Utter

"Utter Barriſters and Ancients, in any Houſe of Court; all principal Trea-
"ſurers, and ſuch as be of the Grand Company of every Inn of Chancery;
"all Attorneys, Prothonotaries and Philazers; all Sheriffs, Eſcheators and
"Feodaries; and all other Perſons, which ſhall take upon them or be ad-
"mitted to any Office in the Law; and all Officers and Miniſters of any
"Court whatſoever; and every of them: Shall take the Oath of Supre-
"premacy, ſetforth in the 1 *El. c.* 1. intituled, *An Act reſtoring to the Crown*
"*the antient Juriſdiction over the Eſtate Eccleſiaſtical and Spiritual,*
"*and aboliſhing all foreign Powers repugnant to the ſame*, before he ſhall
"be admitted to take upon him to uſe, exerciſe, ſupply or occupy, any
"ſuch Vocation, Office, Degree, Miniſtry, Room or Service, in the open
"Court whereunto he ſhall belong; and if he ſhall not belong to any open
"Court, then in an open Place before a convenient Aſſembly to witneſs
"the ſame, and before ſuch Perſon or Perſons, as ſhall have Authority
"by common Uſe or otherwiſe to admit ſuch Perſon to ſuch Vocation,
"Office, Degree, Miniſtry, Room or Service; or elſe before ſuch Perſon
"or Perſons, as by the Queen's Highneſs, her Heirs or Succeſſors, by Com-
"miſſion under the Great Seal ſhall be named and aſſigned."

4. By *par.* 6. it is enacted, "That every Archbiſhop and Biſhop ſhall
"have Power to tender the ſaid Oath to every Spiritual and Eccleſiaſtical
"Perſon within his Dioceſe."

5. By *par.* 7. it is enacted, "That the Lord Chancellor or Keeper of the
"Great Seal for the Time being ſhall and may, at all Times hereafter, di-
"rect a Commiſſion under the Great Seal to any Perſon or Perſons, giving
"them thereby Authority to tender the ſaid Oath to ſuch Perſon or Perſons,
"as by the ſaid Commiſſion the ſaid Commiſſioners ſhall be authoriſed to
"tender the ſame unto."

6. By *par.* 8. it is enacted, That if any Perſon appointed or compella-
"ble by this Act, or by the Act made in the ſaid firſt Year, to take the
"ſaid Oath, to whom the ſaid Oath by ſuch Commiſſion ſhall be appoint-
"ed to be tendered, ſhall at the Time of the ſaid Oath ſo tendered refuſe
"to take the ſame, the Party ſo refuſing ſhall incur the Dangers, Penal-
"ties, Pains and Forfeitures, of the Statute of *Præmunire*."

7. And by *par.* 11. it is enacted, "That if any of the ſaid Perſons do,
"after the Space of three Months after the firſt Tender of the ſaid Oath,
"the ſecond Time refuſe to take the ſame, in Form aforeſaid to be ten-
"dered, every ſuch Offender ſhall for the ſame ſecond Offence ſuffer the
"ſame Pains, Judgment and Execution, as is uſed in Caſes of High
"Treaſon."

8. But by *par.* 17. it is provided, "That this Act ſhall not extend to
"compel any temporal Perſon above the Degree of a Baron to take the
"ſaid Oath."

9. And by *par.* 20. it is provided, "That no Perſon ſhall be compelled,
"by Virtue of this Act, to take the ſaid Oath at the ſecond Time of ten-
"dering the ſame, except the ſame Perſon ſhall be an Eccleſiaſtical Perſon,
"that ſhall have Charge, Cure or Office in the Church, or any Office or
"Miniſtry in any Eccleſiaſtical Court of this Realm; or ſuch Perſon as
"ſhall wilfully refuſe to obſerve the Orders and Rites for Divine Service,
"that be authorized to be uſed and obſerved in the Church of *England*, after
"that he ſhall be publickly admoniſhed by the Ordinary, or ſome of his
"Officers for Eccleſiaſtical Caſes, to keep and obſerve the ſame; or ſuch
"Perſon as ſhall openly and adviſedly deprave by Words, Writings or open
"Facts, any of the Rites and Ceremonies authorized to be uſed in the
"Church of *England*: or ſuch Perſon as ſhall ſay or hear the private
"Maſs prohibited by the Laws of this Realm."

10. By the 1 *W. & M. ſt.* 1. *c.* 8. *par.* 2. all former Statutes, ſo far as they concern the Oath of Supremacy, are repealed, and the ſaid Oath is abrogated.

11. But by *par.* 2. it is enacted, "That all Perſons (other than ſuch "concerning whom Proviſion ſhall be made in this Act, or in any other Act "of this Seſſion of Parliament) who ſhall hereafter be admitted into any "Office or Employment, Eccleſiaſtical or Civil, or come into any Capacity, "in Reſpect or by Reaſon whereof they ſhould have been obliged, by any "Statute, to take the ſaid abrogated Oath, ſhall take the Oaths by this "Act required to be taken, in ſuch Manner, at ſuch Times, before ſuch "Perſons, and in ſuch Courts and Places, as they ought to have taken the "ſaid Oath in Caſe the ſame had not been abrogated: And that every ſuch "Perſon, who ſhall neglect or refuſe to take the ſame, ſhall incur and be "liable to the ſame Penalties, Forfeitures, Diſabilities and Incapacities, as "by any ſuch Statute were appointed for or upon Neglect or Refuſal to "take the ſaid Oath."

12. By this Statute every Perſon, who was before obliged to take the Oath of Supremacy, is obliged to take the Oaths by this Act appointed to be taken; and is, in Caſe of Refuſal, rendered liable to the ſame *Penalties*, *Forfeitures*, *Diſabilities and Incapacities*, as he was before liable to, for refuſing to take the Oath of Supremacy.

13. But as it is not ſaid, that he ſhall ſuffer the ſame Pains, Judgment and Execution, as is uſed in Caſes of High Treaſon, which are the Words of the 5 *Eliz. cap.* 1. or that he ſhall ſuffer as in Caſes of High Treaſon, which are the Words generally made Uſe of in Statutes making Offences High Treaſon, it may be fairly inferred, that the refuſing a ſecond Time to take the Oath of Supremacy has not, ſince the making of the 1 *W. & M. ſt.* 1. *c.* 8. been High Treaſon,

14. It is moreover provided by the 5 *El. c.* 2. *par.* 10. "That this "Act, or any Thing therein contained, or any Attainder to be had by "Virtue of this Act, ſhall not extend to make any Corruption of Blood, "the diſinheriting of any Heir, Forfeiture of Dower, nor to the Prejudice "of the Right or Title of any Perſon or Perſons, other than the Right or "Title of the Offender or Offenders, during his or their natural Lives "only."

15. But there is not ſuch a Proviſion in the 1 *W. & M. ſt.* 1. *cap.* 8.

16. The Conſequence would be, that, if a ſecond Refuſal to take the Oaths by the latter Act required to be taken in Lieu of the abrogated Oath of Supremacy were at this Day High Treaſon, the Puniſhment of ſuch Offence would be more ſevere, than it was before the making of the 1 *W. & M. ſt.* 1. *c.* 8. which is contrary to the Spirit of that Statute, and of the Time in which it was made.

(O) Of putting a Popiſh Bull in Ure.

1. BY the 13 *Eliz c.* 2. *par.* 3. it is enacted, "That if any Perſon "ſhall obtain from the Biſhop of *Rome*, or any of his Succeſſors, "any Bull, Writing or Inſtrument; or ſhall publiſh or put in Ure any ſuch "Bull, Writing or Inſtrument; that every ſuch Offence ſhall be deemed "and adjudged to be High Treaſon."

2. By the ſame *par.* it is enacted, "That the Procurers, Abettors and "Counſellors, to the committing of the ſaid Offences, ſhall ſuffer as in "Caſes of High Treaſon."

3. And

3. And by *par.* 4. it is enacted, "That every Aider, Comforter or "Maintainer, of any Offender againſt this Act, after the committing of "any of the ſaid Offences, ſhall incur the Pains and Penalties of the Sta- "tute of *Præmunire*."

(P) Of reconciling any Perſon, or being reconciled, to the See of Rome.

1. BY the 23 *Eliz. c.* 1. *par.* 1. after reciting that ſince the Statute made in the thirteenth Year of the Reign of the Queen, for preventing the putting of Popiſh Bulls in Ure, divers evil-affected Perſons have practiſed other Means than by Bulls, to withdraw the Queen's Subjects from their natural Obedience to her Majeſty, to obey the uſurped Authority of the See of *Rome*, it is enacted, "That if any Perſon ſhall have or pretend "to have Power, or ſhall by any Means put in Practice, to abſolve, per- "ſuade or withdraw, any of the Queen's Subjects, or any within her "Realms, from their natural Obedience to her Majeſty; or to withdraw "any of them, for that Intent, from the Religion now eſtabliſhed to the "*Romiſh* Religion; or to move any of them, to promiſe any Obedience to "any pretended Authority of the See of *Rome*, or of any other Prince, "State or Potentate, to be had or uſed within her Dominions; or ſhall do "any overt Act, for that Intent or Purpoſe; that then every ſuch Perſon "ſhall ſuffer as in Caſes of High Treaſon."

2. And by the ſame *par.* it is enacted, "That if any Perſon ſhall by any "Means be willingly abſolved or withdrawn as aforeſaid, or willingly be "reconciled, or ſhall promiſe any Obedience to ſuch pretended Authority, "Prince, State or Potentate, as is aforeſaid, that then every ſuch Perſon "ſhall ſuffer as in Caſes of High Treaſon."

3. By the ſame *par.* it is enacted, "That the Procurers and Coun- "ſellors unto any of theſe Offences ſhall ſuffer as in Caſes of High "Treaſon."

4. And by *par.* 3. it is enacted, "That any Perſon, who ſhall wittingly "be Aider or Maintainer of any Perſon ſo offending, knowing the ſame, "ſhall ſuffer as in Caſes of Miſpriſion of High Treaſon."

5. It has been holden, that the bare pretending to abſolve a Subject from his natural Allegiance, without an actual perſuading him to withdraw the ſame; and that the actual perſuading of a Subject to withdraw his natural Allegiance, without pretending to a Power of abſolving him, are both High Treaſons within the Meaning of this Statute. Sav. 3. pl. 9. Campion's Caſe.

6. By the 3 *Ja* 1. *cap.* 4. *par.* 22. it is enacted, "That if any Perſon "ſhall, either upon the Seas or beyond the Seas, or in any other Place "within the Dominions of the King's Majeſty, his Heirs or Succeſſors, "put in Practice to abſolve, perſuade or withdraw any of the Subjects of "the King's Majeſty, or of his Heirs and Succeſſors, from their natural "Obedience to his Majeſty, his Heirs or Succeſſors; or to reconcile them "to the See of *Rome*; or to move them, or any of them, to promiſe "Obedience to any pretended Authority of the See of *Rome*, or to any "other Prince, State or Potentate; that then every ſuch Perſon ſhall "ſuffer as in Caſes of High Treaſon."

7. And

7. And by *par.* 23. it is enacted, "That if any ſuch Perſon as aforeſaid "ſhall be, either upon the Sea or beyond the Seas, or in any other Place, "within the Dominions of the King's Majeſty, his Heirs or Succeſſors, "willingly abſolved, or withdrawn, as aforeſaid; or willingly reconciled; "or ſhall promiſe Obedience to any ſuch pretended Authority, Prince, "State or Potentate; that every ſuch Perſon ſhall ſuffer as in Caſes of "High Treaſon."

8. But by *par.* 24. it is provided, "That this laſt Clauſe ſhall not extend "to any Perſon whatſoever, who ſhall be reconciled to the See of *Rome* "as aforeſaid (for and touching the Point of being reconciled only) that "ſhall return into this Realm, and within ſix Days after ſuch Return, "before the Biſhop of the Dioceſe, or two Juſtices of the Peace jointly "or ſeverally of the County where he ſhall arrive, ſubmit himſelf to "his Majeſty and his Laws; and take the Oath of Supremacy, ſet forth "by an Act made in the firſt Year of the Reign of the late Queen "*Elizabeth*, and alſo the Oath of Allegiance before ſet forth in this "Act"

9. By the 1 *W. & M. ſtat.* 1. *cap.* 8. *par.* 2. All Statutes, ſo far as they concern the Oath of Supremacy, are repealed, and the ſaid Oath is abrogated.

10. A Perſon, who has been reconciled to the See of *Rome*, is, by the Abrogation of the Oath of Supremacy ſet forth by the Act made in the firſt Year of Queen *Elizabeth*, prevented from complying literally with the Terms of the Proviſo contained in the 3 *Ja.* 1. *c.* 4. *par.* 24.

11. There could ſcarce have been a Doubt, that the taking of the Oaths, required by the 1 *W. & M. ſt.* 5. *c.* 8. to be taken in the Room of the Oaths of Supremacy thereby abrogated, would at this Day anſwer every Purpoſe, which the taking of the abrogated Oath would heretofore have done.

12. But to remove all Poſſibility of Doubt as to this Matter, it is by the 1 *W. & M. ſt.* 1. *c.* 8. *par.* 4. enacted, "That all Perſons (other than "ſuch concerning whom Proviſion ſhall be made in this Act, or in any "other Act of this Seſſion of Parliament) who ſhall hereafter come into "any Capacity, in Reſpect or by Reaſon whereof they would have been "obliged by the ſaid Statutes to take the ſaid abrogated Oath, ſhall take "the Oaths required by this Act to be taken, in ſuch Manner, at ſuch "Times, before ſuch Perſons, and in ſuch Places, as they ought to "have taken the ſaid abrogated Oath, in Caſe the ſame had not been "abrogated."

(Q) Of receiving Popiſh Orders or Education.

1. BY the 27 *Eliz. cap.* 2. *par.* 3. it is enacted, "That it ſhall not be "lawful for any Jeſuit, Seminary Prieſt or other Prieſt, Deacon "or Religious or Eccleſiaſtical Perſon whatſoever, being born within this "Realm or any other her Highneſs's Dominions, hereafter to be made, "ordained or profeſſed, by any Authority or Juriſdiction derived, chal- "lenged or pretended, from the See of *Rome*, by or of what Name, Title, "or Degree, ſoever the ſame ſhall be called or known, to come into, be "or remain, in any Part of this Realm or any other her Highneſs's Domi- "nions, other than in ſuch ſpecial Caſes, and upon ſuch ſpecial Occaſions "only,

" only, and for ſuch Time only, as is expreſſed in this Act; and if he do, " that then every Perſon ſo offending ſhall ſuffer as in Caſes of High " Treaſon."

2. But by *par* 10. it is provided, " That this Act ſhall not extend to " any ſuch Religious or Eccleſiaſtical Perſon before mentioned, as ſhall " within three Days, after he ſhall come into this Realm or any other her " Highneſs's Dominions, ſubmit himſelf to ſome Archbiſhop or Biſhop of " this Realm, or to ſome Juſtice of the Peace within the County where " he ſhall arrive and land, and do thereupon truly and ſincerely, before " the ſame Archbiſhop, Biſhop or Juſtice of the Peace, take the Oath of " Supremacy ſet forth in an Act made in the firſt Year of her Highneſs's " Reign, and by Writing under his Hand confeſs and acknowledge, and " from thenceforth continue, his due Obedience to her Majeſty's Laws, " Statutes and Ordinances, made or to be made in Cauſes of Religion."

3. It is however by *par.* 16. provided, " That if any Perſon, ſubmit- " ting himſelf as aforeſaid, do at any Time, within the Space of ten Years " after ſuch Submiſſion, come within ten Miles of ſuch Place where her " Majeſty ſhall be, without ſpecial Licence from her Majeſty in Writing " under her Hand; that then ſuch Perſon ſhall take no Benefit of his ſaid " Submiſſion, but the ſame ſhall be void."

4. It has been holden, that if a Perſon, who comes within the Deſcrip- Raym. 377. tion of this Statute, being in a Ship with Deſign to go to *Ireland*, be driven Occalian's by a Storm into *England* and immediately apprehended, he is not guilty of Caſe. High Treaſon; for his Deſign was to go into *Ireland*; and ſuch Perſon can 1 Hawk. 45. never be ſaid to come into, be or remain, in *England* within the Meaning of this Statute; becauſe it happened, that he was forced into *England* by the Act of God, and was againſt his Will detained there as a Priſoner.

5. By the 27 *Eliz. cap.* 2. *par.* 5. it is enacted, " That if any of her " Majeſty's Subjects, not being ſuch a religious or Eccleſiaſtical Perſon as " is in this Act before mentioned, who hereafter ſhall be of or brought up " in any College of Jeſuits or Seminary already erected and ordained, or " hereafter to be erected and ordained, in the Parts beyond the Seas, or " out of this Realm in any foreign Parts, ſhall not, within ſix Months " next after Proclamation made in that Behalf in the City of *London* under " the Great Seal of *England*, return into this Realm, and within two " Days next after ſuch Return, before the Biſhop of the Dioceſe or two " Juſtices of the Peace of the County where he ſhall arrive, ſubmit him- " ſelf to her Majeſty and her Laws, and take the Oath of Supremacy ſet " forth in an Act made in the firſt Year of her Reign; that then every " ſuch Perſon, who ſhall otherwiſe return, come into, or be in this " Realm, or in any other her Highneſs's Dominions, for ſuch Offence of " returning into, or being in the Realm, or any other her Highneſs's Do- " minions, without Submiſſion as aforeſaid, ſhall ſuffer as in Caſes of " High Treaſon."

6. By the 1 *W. & M. ſtat.* 1. *cap.* 8. All Statutes, ſo far as they concern the Oath of Supremacy, are repealed, and the ſaid Oath is abrogated.

7. But as it has been before obſerved, in the Caſe of being reconciled to Ante, p. 136. the See of *Rome*, the taking of the Oaths, required by the 1 *W. & M. ſtat.* 1. *cap.* 8. to be taken in Lieu of the Oaths of Supremacy and Allegiance thereby abrogated, does at this Day anſwer every Purpoſe, which the taking the Oath of Supremacy would heretofore have done.

(R) Of denying the Power of Parliament to limit the Succeſſion of the Crown.

1. BY the 6 *Ann. cap.* 7. *par.* 1. it is enacted, "That if any Perſon "or Perſons ſhall maliciouſly, adviſedly and directly, by Writing "or Printing, maintain and affirm, that the Kings or Queens of this "Realm, with and by the Authority of Parliament, are not able to "make Laws and Statutes, of ſufficient Force and Validity to limit and "bind the Crown, and the Deſcent, Limitation, Inheritance and Govern-"ment thereof; every ſuch Perſon or Perſons ſhall ſuffer as in Caſes of "High Treaſon."

(S) Of affirming that a Perſon, not in the Succeſſion as by Law eſtabliſhed, hath any Right to the Crown.

1. BY the 6 *Ann. cap.* 7. *par.* 1. it is enacted, "That if any Perſon or "Perſons ſhall maliciouſly, adviſedly and directly, by Writing or "Printing, maintain and affirm, that our Sovereign Lady the Queen, is "not the lawful or rightful Queen of theſe Realms; or that the pretended "Prince of *Wales*, who now ſtiles himſelf King of *Great Britain*, or King "of *England* by the Name of *James* the Third, or King of *Scotland* by the "Name of *James* the Eighth, hath any Right or Title to the Crown of "theſe Realms, or that any other Perſon or Perſons hath or have any "Right or Title to the ſame, otherwiſe than according to an Act of Par-"liament, made in *England* in the firſt Year of the Reign of their late "Majeſties King *William* and Queen *Mary* of ever bleſſed and glorious "Memory, intituled, *An Act declaring the Rights and Liberties of the "Subject, and ſettling the Succeſſion of the Crown*; and one other Act, "made in *England* in the twelfth Year of the Reign of his ſaid late Ma-"jeſty King *William* the Third, intituled, *An Act for the further Limita-"tion of the Crown, and better ſecuring the Rights and Liberties of the "Subject*; and the Acts lately made in *England* and *Scotland* mutually for "the Union of the Kingdoms; every ſuch Perſon ſhall ſuffer as in Caſes "of High Treaſon."

(T) Of

(T) Of endeavouring to hinder the Perſon, next in the Succeſſion as by Law eſtabliſhed, from ſucceeding to the Crown.

1. BY the 1 *Ann. ſtat.* 2. *cap.* 17. *par.* 3. it is enacted, "That if any "Perſon or Perſons ſhall endeavour to deprive or hinder any Per- "ſon, who ſhall be next in Succeſſion to the Crown, according to the "Limitations in an Act, intituled, *An Act declaring the Rights and Liber-* "*ties of the Subject, and ſettling the Succeſſion of the Crown*; and accord- "ing to one other Act, intituled, *An Act for the further Limitation of the* "*Crown, and better ſecuring the Rights and Liberties of the Subject*, from "ſucceeding after the Deceaſe of her Majeſty to the Imperial Crown of "this Realm, and the Dominions and Territories thereunto belonging, ac- "cording to the Limitations in the before mentioned Acts; and the ſame "maliciouſly, adviſedly and directly, ſhall attempt by any overt Act or "Deed, every ſuch Offence ſhall be adjudged High Treaſon."

(U) Of correſponding with the Pretender, or one of his Sons.

1. BY the 13 *W.* 3. *cap.* 3. it is enacted, "That if any of the Subjects "of the Crown of *England* ſhall, within this Realm or without, "hold, entertain or keep, any Intelligence or Correſpondence, in Perſon, "or by Letters, Meſſages or otherwiſe, with the pretended Prince of "*Wales*, or with any Perſon or Perſons employed by him, knowing ſuch "Perſon to be ſo employed; or ſhall by Bill of Exchange, or otherwiſe, "remit or pay any Sum or Sums of Money for the Uſe or Service of the "ſaid pretended Prince of *Wales*, knowing ſuch Money to be for ſuch "Uſe or Service; ſuch Perſon ſo offending ſhall be taken, deemed and "adjudged to be guilty of High Treaſon."

2. By the 17 *Geo.* 2. *cap.* 39. *par.* 1. after reciting, that the eldeſt Son of the Pretender is lately arrived in the *French* Dominions, and hath been received and encouraged by the *French* King, it is enacted, "That if any "of the Subjects of the Crown of *Great Britain* ſhall, within this Realm "or without, hold, entertain or keep, any Intelligence or Correſpondence, "in Perſon, or by Letters, Meſſages or otherwiſe, with the eldeſt or any "other Son or Sons of the ſaid Pretender, or with either or any of them, "or with any Perſon or Perſons employed by the ſaid eldeſt, or other Son "or Sons of the ſaid Pretender, or by either or any of them, knowing ſuch "Perſon to be ſo employed; or ſhall by Bill of Exchange, or otherwiſe, "remit or pay any Sum or Sums of Money for the Uſe or Service of the "ſaid eldeſt, or other Son or Sons of the ſaid Pretender, or of either or any "of them, knowing ſuch Money to be for ſuch Uſe or Service; ſuch Per- "ſon ſo offending ſhall be taken, deemed and adjudged, to be guilty of "High Treaſon."

(W) Of

(W) Of corresponding or treating with a Rebel or Enemy.

1. BY the 2 & 3 *Ann. cap.* 20. *par.* 34. after reciting, that there is not any effectual Provision made, for the Government of her Majesty's Land Forces out of the Realm of *England* and *Ireland*, it is enacted, "That if any Officer or Soldier in her Majesty's Army shall, either upon "Land out of *England*, or upon the Sea, hold Correspondence with any "Rebel or Enemy of her Majesty, or give them Advice or Intelligence, "either by Letters, Messages, Signs or Tokens, or in any Way whatso-"ever, or shall treat with such Rebels or Enemies, or enter into any Con-"dition with them, without her Majesty's Licence, or Licence of the "General, Lieutenant-General or Chief Commander, that then every "Person so offending shall suffer as in Cases of High Treason."

(X) Of Petit Treason in the general.

3 Inst. 20. 1 Hawk. P. C. 87, 88.

1. DIVERS Offences were heretofore Petit Treason, which are not so at this Day; as Piracy by a Subject; a Discovery of the King's Counsel by one of the Grand Jurors; an Attempt by a Wife to kill her Husband.

2. By the 25 *Ed.* 3. *stat.* 5. *cap.* 2. after declaring the slaying of a Master by his Servant, the slaying of a Husband by his Wife, and the slaying of a Prelate by an Ecclesiastick, who oweth Faith and Obedience to the Prelate, to be Treasons, it is declared, "That because many other "Cases of the like Treason may happen in Time to come, which a Man "cannot think of or declare at present, if any other Case, supposed to be "Treason, which is not specified above, doth hereafter happen before any "one of the Justices, such Justice shall not proceed to Judgment of Trea-"son, until the Case be laid before the King in Parliament, and it is de-"clared, whether it ought to be adjudged a Treason or other Felony."

3. It does not appear, that any Offence was, in Consequence of the Power given by this Clause, declared in Parliament to be Petit Treason.

4. And by the 1 *Mar. stat.* 1. *cap.* 1. *par.* 3. it is enacted, "That no "Act or Offence shall be taken, had, deemed or adjudged, to be Petit "Treason, but only such as be declared and expressed to be Petit Treason, "in or by the Act of Parliament, made in the twenty-fifth Year of the "Reign of the most noble King of famous Memory *Edward* the Third, "touching or concerning Treasons or the Declarations of Treasons."

5. As no Offence has been by any Statute subsequent to the 1 *M. st.* 1. *c.* 1. made Petit Treason, it follows, that no Offence is at this Day Petit Treason, unless it be one of those, which is by the 25 *Ed.* 3. *st.* 5. *cap.* 2. declared to be so.

Plowd. 86. 3 Inst. 12, 81. 18 Eliz. c. 1. s. 1.

6. No Offence is to be adjudged Petit Treason, unless it be clearly and without Argument or Inference within the Meaning of the 25 *Ed.* 3. *st.* 5. *c.* 2. for a Statute declaring an Offence to be Treason ought not to be extended by Equity.

7. As

7. As Petit Treaſon implies Murder, it follows, that if the killing of a Maſter, Huſband or Prelate be not attended with ſuch Circumſtances, as would have made it Murder in the Caſe of killing any other Perſon, the Offence is not Petit Treaſon. H. P. C. 24. 1 Hawk. P. C. 88.

8. If upon an Indictment for Petit Treaſon the killing appear to have been upon ſuch ſudden Provocation, that the Offence would, in Caſe the killing had been by a Stranger to the Perſon killed, have amounted only to Manſlaughter, the Jury may find the Offender guilty of Manſlaughter only. 1 H. H. P.C. 378.

9. There may be an Acceſſary, either before or after the Fact in Petit Treaſon. 3 Inſt. 20, 21, 138.

10. At the Common Law an Acceſſary to Petit Treaſon, either before or after the Fact, was intitled to the Benefit of the Clergy.

11. But by the 4 & 5 *Phil. & Mar. cap.* 4. *par.* 1. the Benefit of the Clergy is taken away from an Acceſſary before the Fact, it being thereby enacted, "That if any Perſon ſhall maliciouſly command, hire or coun-"ſel, any Perſon to commit any Petit Treaſon, every ſuch Offender ſhall "not have the Benefit of Clergy."

12. The Diſtinction of High and Petit Treaſon did never exiſt in the Law of *Scotland:* For every Offence, which was by the Law of *England* Petit Treaſon, was by the Law of *Scotland* Treaſon.

13. At this Day an Offence, which is in *England* Petit Treaſon, is in *Scotland* only a capital Offence: It being by the 7 *Ann. cap.* 21. *par.* 7. enacted, "That Murder under Truſt, which was by the Law of *Scotland* "Treaſon, ſhall for the Time to come be only adjudged and deemed to "be a capital Offence."

(Y) Of ſlaying a Huſband by his Wife.

1. IT is by the 25 *Ed.* 3. *ſtat.* 5. *cap.* 2. declared to be Petit Treaſon, "When a Wife ſlayeth her Huſband."

2. If *A.* who is married to *B.* do during the Life of *B.* marry *C.* the latter Woman, although ſhe be to ſome Purpoſes a Wife *de facto*, is not a Wife within the Meaning of this Statute; becauſe the ſecond Marriage was *ipſo facto* void. 1 H. H. P.C. 381.

3. If a Woman, after having been divorced *Cauſa adulterii vel ſævitiæ*, murder the Man from whom ſhe is divorced, this is Petit Treaſon: For, as a Divorce for either of theſe Cauſes does not diſſolve the Marriage, ſhe continues to be a Wife. Ibid.

4. But a Woman, who has been divorced *Cauſa conſanguinitatis vel præcontractus*, cannot be guilty of Petit Treaſon: Becauſe the Marriage is diſſolved by a Divorce for either of theſe Cauſes. Ibid.

5. If a Wife and a Stranger are both Principals in the Murder of her Huſband, the Wife is guilty of Petit Treaſon; but the Stranger is only guilty of Murder. 3 Inſt. 20. H. P. C. 25. 1 Hawk. P. C. 88.

6. If a Wife, who has procured a Stranger to murder her Huſband, be by Agreement with the Stranger in the Houſe wherein the Murder is committed, the Wife, although ſhe were not in the Room at the Time of committing it, is guilty of Petit Treaſon: For as the Stranger is in ſuch Caſe encouraged, by the Expectation of having her immediate Aſſiſtance Moor 91. H. P. C. 25. 1 Hawk. P. C. 88.

Aſſiſtance in Caſe the ſame ſhould be wanted, to commit the Murder, ſhe is in Judgment of Law as much a Principal, as if ſhe ſtood by with a Weapon in her Hand ready to aſſiſt.

3 Inſt. 20. H. P. C. 25. 1 Hawk. P. C. 88.

7. If a Wife have procured a Servant to murder his Maſter, ſhe, although the Fact be perpetrated in her Abſence, is an Acceſſary to Petit Treaſon.

3 Inſt. 20, 139. H. P. C. 24, 25. 1 H. H. P. C. 379. 1 Hawk. P. C. 88.

8. But if a Wife, who has procured a Stranger to murder her Huſband, be abſent when the Fact is perpetrated, ſhe is only an Acceſſary to Murder: For the Principal is only guilty of Murder; and the Maxim is, that *Acceſſorius ſequitur Naturam ſui Principalis.*

1 Hawk. P. C. 88.

9. If a Wife murder her Huſband by the Procurement of a Stranger, the Stranger is an Acceſſary to Petit Treaſon.

(Z) Of ſlaying a Maſter by his Servant.

1. BY the 25 *Ed.* 3. *ſtat.* 5. *cap.* 2. it is declared to be Petit Treaſon, "When a Servant ſlayeth his Maſter."

3 Inſt. 20. Plowd. 86. 1 Hawk. P. C. 88.

2. The Murder of his Miſtreſs, or of his Maſter's Wife, by a Servant, has been adjudged Petit Treaſon; for although neither of theſe Caſes is within the Letter of the Statute, both of them are clearly within the Meaning thereof; inaſmuch as the Word Maſter ſignifies any Perſon, to whom another ſtands related as Servant.

Plowd. 86. 3 Inſt. 20, 22, 23. H. P. C. 24. 1 Hawk. P. C. 87.

3. If a Child murder his Father or Mother, this, although it be a much more heinous Offence, is not Petit Treaſon: Becauſe it is not a Caſe provided againſt by this Clauſe; and the Judges are reſtrained by another Clauſe in the 25 *Ed.* 3. *ſt.* 5. *cap.* 2. from interpreting this Statute *a ſimili*, or a *Minore ad Majus.*

3 Inſt. 20. H. P. C. 24. 1 Hawk. P. C. 87.

4. But if a Child, who ſerves his Father or Mother for Meat, Drink, Clothes or Wages, murder his Father or Mother, this is Petit Treaſon; for ſuch Child is to be conſidered as a Servant.

Bro. Coron. 116. Plowd. 206. 3 Inſt. 20. H. P. C. 23. 1 Hawk. P. C. 88.

5. A Servant, after having quitted his Service a Year, murdered the Perſon who had been his Maſter. This was adjudged to be Petit Treaſon; becauſe it appeared, that the Murder was in Conſequence of Malice conceived againſt the Maſter, while the Servant was in his Service.

6. It has been already ſhewn, in treating of that Species of Petit Treaſon which conſiſts in the ſlaying of a Huſband by his Wife, in what Caſes the Wife is a Principal in, or an Acceſſary to, Petit Treaſon, or a Principal in, or an Acceſſary to, Murder.

7. It is in this Place ſufficient to ſay, without repeating what is there ſaid, that any Circumſtance, which would in the Caſe of ſlaying a Huſband by his Wife have made her ſo, does in the Caſe of ſlaying a Maſter by his Servant make the Servant a Principal in, or an Acceſſary to, Petit Treaſon, or a Principal in, or an Acceſſary to, Murder.

(Aa) Of slaying a Prelate by an Ecclesiastick, who oweth Faith and Obedience to the Prelate.

1. BY the 25 *Ed.* 3. *stat.* 5. *cap.* 2. it is declared to be Petit Treason, "When a Man, secular or religious, slayeth his Prelate, to whom "he oweth Faith and Obedience."

2. If an Ecclesiastick, who enjoys a Benefice in the Diocese of *A.* within the Province of *B.* murder the Archbishop of the Province of *B.* this, although the Archbishop be not the immediate Superior of such Ecclesitick, seems to be Petit Treason. 1 H. H. P. C. 381.

3. If an Ecclesiastick hold two Benefices in two Dioceses, it is Petit Treason to murder the Bishop of either Diocese; because a canonical Obedience is due to the Bishops of both Dioceses. Ibid.

4. It is laid down, that if an Ecclesiastick slay the Bishop who ordained him, this is Petit Treason, although he do not enjoy a Benefice or Cure of Souls within the Diocese of such Bishop; because he promised at his Ordination a canonical Obedience to him. Ibid.

5. It has been already shewn, in treating of that Species of Petit Treason which consists in the slaying of a Husband by his Wife, in what Cases the Wife is a Principal in, or an Accessary to, Petit Treason, or a Principal in, or an Accessary to, Murder.

6. It is in this Place sufficient to say, without repeating what is there said, that any Circumstance, which would in the Case of slaying a Husband by his Wife have made her so, does in the Case of slaying a Prelate by an Ecclesiastick who owes Faith and Obedience to him, make the Ecclesiastick a Principal in, or an Accessary to, Petit Treason, or a Principal in, or an Accessary to, Murder.

(Bb) Of the Indictment of Treason.

1. IT is in the general true, that Grand Jurors can only inquire of such Offences, as arise within the County for which they are returned. H. P. C. 204.

2. But by the 28 *Hen.* 8. *cap.* 15. *par.* 1. it is enacted, "That all Treasons, hereafter to be committed in or upon the Sea, or in any Place "where the Admiral or Admirals have or pretend to have Jurisdiction, "shall be inquired of in such Shires and Places in the Realm, as shall be "limited by the King's Commission to be directed for the same, in like "Form and Condition as if any such Offence had been committed in or "upon the Land."

3. At the Common Law Treason committed out of the Realm could only be inquired of in the County where the Offender had Land. H. P. C. 15. 203.

4. But by the 35 *Hen.* 8. *cap.* 2. *par.* 1. it is enacted, "That all Treasons, hereafter committed by any Person or Persons out of this Realm "of *England*, shall be from henceforth inquired of before the King's Justices

" tices of his Bench for Pleas to be holden before himſelf, by good and " lawful Men of the ſame Shire where the ſaid Bench ſhall ſit; or elſe " before ſuch Commiſſioners, and in ſuch Shire of the Realm, as ſhall be " aſſigned by the King's Majeſty's Commiſſion, and by good and lawful " Men of the ſame Shire; in like Manner and Form to all Intents and " Purpoſes, as if ſuch Treaſons had been committed within the ſame Shire " where they ſhall be ſo inquired of."

5. The Conſtruction ſeems to have been, that this Act extends only to ſuch Offences, as were at the Time of making it Treaſon; for in divers ſubſequent Statutes, by which other Offences are made Treaſons, there is a Proviſion for the Caſe of their having been committed out of the Realm.

6. By the 13 *W.* 3. *cap.* 3. *par.* 43. it is enacted, " That where any of " the Offences, *by this Statute made High Treaſons*, ſhall be committed " out of this Realm, the ſame may be inquired of in any County of this " Kingdom of *England*."

7. By the 2 & 3 *Ann. cap.* 20. *par.* 36. it is enacted, " That all the " Offences, *by this Statute made High Treaſons*, which ſhall be committed " upon Land out of *England*, or upon the Sea, may be inquired of, in the " Court of Queen's Bench, by good and lawful Men of the ſame County " where the ſaid Court ſhall ſit; or before ſuch Commiſſioners, and in " ſuch County of this Realm, as ſhall be aſſigned by the Queen's Majeſty, " and by good and lawful Men of the ſame County; in Manner and Form " to all Intents and Purpoſes, as if the ſaid Treaſons had been committed " within the ſame County."

8. By the 7 *Ann. cap.* 21. *par.* 5. it is enacted, " That all Treaſons, " which after the firſt Day of *July* one thouſand ſeven hundred and nine " ſhall be committed by any Native of *Scotland* upon the High Sea, or " in any Place out of this Realm of *Great Britain*, ſhall be inquired of " in ſuch Shire, Stewarty or County of *Great Britain*, as ſhall be aſſigned " by the Queen's Commiſſion, in like Manner, as if ſuch Treaſons had " been committed in the ſame Shire where they ſhall be inquired of as " aforeſaid."

9. By the 17 *Geo.* 2. *cap.* 39. *par.* 4. it is enacted, " That where any " of the Offences, *by this Statute made High Treaſons* ſhall be committed " out of this Realm, the ſame may be alledged, laid and inquired of, in " any County of that Part of *Great Britain* called *England*, or in any Shire " or Stewarty in that Part of *Great Britain* called *Scotland*."

10. By the 7 *W.* 3. *cap.* 3. *par* 6. it is enacted, That no Perſon or " Perſons ſhall be indicted or proſecuted for any High Treaſon, whereby " any Corruption of Blood may be made, that ſhall be committed or done " within the Kingdom of *England*, Dominion of *Wales* or Town of *Ber-* " *wick upon Tweed*, unleſs the Indictment be found within three Years next " after the Treaſon done or committed."

11. But by *par.* 7. it is provided, " That if any Perſon or Perſons ſhall " be guilty of deſigning, endeavouring or attempting, any Aſſaſſination of " the King, by Poiſon or otherwiſe, ſuch Perſon or Perſons may be pro- " ſecuted at any Time, notwithſtanding the aforeſaid Limitation."

12. By the 8 & 9 *W.* 3. *cap.* 26. *par.* 4. it is enacted, " That no Pro- " ſecution ſhall be for any Offence againſt this Act, *which was made for* " *better preventing the Counterfeiting of the current Coin of this Kingdom*, " unleſs ſuch Proſecution be commenced within three Months after ſuch " Offence committed."

13. But by the 7 *Ann. cap.* 25. *par.* 2. it is enacted, " That the Pro- " ſecution of ſuch Perſon or Perſons, as offend againſt the Statute made in " the eighth and ninth Years of his late Majeſty's Reign, intituled, *An Act* " *for better preventing the Counterfeiting of the current Coin of this Kingdom*, " by

" by making or mending, or beginning to make or mend, any coining " Tool or Inſtrument therein prohibited; or by marking of Money round " the Edges, with Letters or Grainings; may be commenced at any Time " within ſix Months after ſuch Offence committed; any Thing in the ſaid " Act to the contrary notwithſtanding."

14. By the 1 *Ed.* 6. *cap.* 12. *par.* 22. it is enacted, " That no Perſon " or Perſons ſhall be indicted, arraigned or condemned, for any Offence " of Treaſon; unleſs the ſame Offender be accuſed by two ſufficient " and lawful Witneſſes; or ſhall willingly without Violence confeſs the " ſame."

15. And by the 5 *Ed.* 6. *cap.* 11. *par.* 12. it is enacted, " That no " Perſon or Perſons, after the firſt Day of *June* next coming, ſhall be in- " dicted for any Treaſons that now be or hereafter ſhall be, which ſhall be " perpetrated, committed or done, unleſs the ſame Offender or Offenders " be thereof accuſed by two lawful Accuſers."

16. Some Judges have been of Opinion, that both theſe Statutes are virtually repealed by the 1 & 2 *Ph.* & *M. cap.* 10. it being thereby enacted, " That all Trials hereafter to be had, awarded or made, for any Trea- " ſon, ſhall be had and uſed according to the Courſe of the Common Law " of this Realm, and not otherwiſe." 3 Inſt. 26. Kel. 26.

17. But *Coke* Chief Juſtice was of Opinion, that the latter Statute relates only to the Trial of Treaſon, and not to the finding of an Indictment for Treaſon. 3 Inſt. 25, 26.

18. This Opinion was in Part founded on the two following Reaſons; which ſeem to be concluſive.

19. The Word *awarded* uſed in the 1 & 2 *Ph.* & *M. c.* 10. is only applicable to a Trial; for an Indictment cannot with any Degree of Propriety be ſaid to be awarded. 3 Inſt. 27.

20. If the Indictment had ever been conſidered as Part of the Trial, it muſt, as that Statute directs that every Peer of the Realm ſhall be tried by his Peers, in the Caſe of a Peer of the Realm, always have been found by Peers: But the Practice has been conſtantly otherwiſe. 3 Inſt. 26.

21. It may be inferred, from a Clauſe in the 1 & 2 *Ph.* & *M. c.* 10. by which one Witneſs is declared to be ſufficient, for the finding of a Bill of Indictment for ſome High Treaſons particularly mentioned, that two are neceſſary for the finding of a Bill for any other High Treaſon. 3 Inſt. 25, 26.

22. By the 7 *W.* 3. *cap.* 3. *par.* 2. it is enacted, " That, " after the " five and twentieth Day of *March* one thouſand ſix hundred and ninety- " ſix, no Perſon ſhall be indicted of High Treaſon, whereby any Corrup- " tion of Blood may be made, but by and upon the Oaths and Teſtimony " of two lawful Witneſſes, either both of them to the ſame overt Act, or " one of them to one, and the other of them to another overt Act of the " ſame Treaſon; any Law, Statute or Uſage to the contrary notwith- " ſtanding.

23. But by *par.* 13. it is provided, " That this Act ſhall not extend to " any Indictment for counterfeiting his Majeſty's Coin, or his Great Seal, " Privy Seal, Privy Signet or Sign Manual, and conſequently one Wit- " neſs is ſufficient for the finding of an Indictment for one of theſe " Offences.

24. In Indictment for an Offence declared to be Treaſon by the 25 *Ed.* 3. *ſtat.* 5. *cap.* 2. the Treaſon muſt be charged in the very Words of that Statute. Cro. Car. 125. Pine's Caſe.

25. Nay ſo ſtrict has been the Adherence to the Words of this Statute, that where the King had been actually killed, the Killing was not laid as the Treaſon: but the Compaſſing of his Death was laid as the Treaſon, and the Killing as an overt Act. Kel. 8. The Caſe of the Regicides.

26. Every 1 Hawk. P. C. 34.

Carth. 319. Tucker's Caſe. 3 Inſt. 15. 26. Every High Treaſon muſt be laid to have been committed *proditorie.* H. P. C. 11. Salk. 633.

5 Stat. Tr. 2. Vaughan's Caſe. 27. It has been ſaid, that it is not neceſſary, in an Indictment for High Treaſon, to charge an overt Act, in any other Species of Treaſon except that of compaſſing or imagining the King's Death.

3 Inſt. 14. H. P. C. 13. 1 Hawk. P. C. 38. Salk. 634. 5 St. Tr. 21, 22. 28. But the better Opinion is, that as the Words in the 25 *Ed.* 3. *ſtat.* 5. *cap.* 2. *and thereof be provably attainted of overt Act*, do as well relate to the High Treaſon of violating certain Perſonages; to that of levying War againſt the King; and to that of adhering to the King's Enemies; as to that of compaſſing or imagining the King's Death; an overt Act muſt in every one of theſe Treaſons be laid.

Salk. 633. Cranburn's Caſe. 29. It is not neceſſary, that an overt Act be laid to have been done *proditorie*; becauſe the overt Act is not laid as the Treaſon, but as the Evidence thereof.

4 St. Tr. 710, 711. Lowick's Caſe. Kel. 15. 30. It is ſufficient, to lay a Conſultation to kill the King as an overt Act of compaſſing or imagining his Death, without laying the Manner in which the King's Death was to have been brought about; for the Conſultation is in itſelf an overt Act.

2 Ventr. 316. Harding's Caſe. 31. It muſt be ſhewn in an Indictment for adhering to the King's Enemies, to whom and at what Time the Adherence was, that the Court may judge, whether the Perſons alledged to have been adhered to were at the Time of adhering Enemies of the King.

5 St. Tr. 36. Vaughan's Caſe. 1 Hawk. P. C. 38. 32. But it is not neceſſary to alledge in ſuch Indictment, that the Adhering was againſt the King; for this ſhall be intended.

2 Show. 411. 33. In an Indictment, wherein the overt Act laid is the ſpeaking of treaſonable Words, it muſt be alledged, that the Words ſpoken related to the King.

MS. Rep. Anon. Hil. 13 W. 3. 34. It was holden by all the Judges, that it muſt be ſhewn in an Indictment for coining, that the Perſon indicted was not within any of the Exceptions, mentioned in the enacting Clauſe of the Statute made in the eighth and ninth Years of the Reign of *William* the Third, intituled, *An Act for better preventing the Counterfeiting of the current Coin of this Kingdom*; and the Judgment was arreſted, becauſe this was not ſhewn.

Ibid. 35. But it was in this Caſe holden, that another Indictment would lie; and the Party, in whoſe Favour the Judgment had been arreſted, was afterwards convicted upon another Indictment, and executed.

1 Hawk. P. C. 45. 36. It need not be alledged, in an Indictment for receiving Popiſh Orders, in what Place the Perſon indicted was born; or in what Place he was ordained: It being ſufficient to alledge in the Words of the Statute, by which this Offence is made High Treaſon, *that ſuch Perſon was born in this Realm, or in the King's Dominions; and was made, ordained or profeſſed, by an Authority or Juriſdiction derived, challenged or pretended, from the See of* Rome.

Kel. 15. The Caſe of the Regicides. 37. It has been ſaid, that as every overt Act of compaſſing the King's Death is tranſitory, an overt Act of this Species of High Treaſon need not be laid in the County, wherein the Treaſon is charged to have been committed.

6 St. Tr. 319. Layer's Caſe. Foſt. 10. 38. But it ſeems to be the better Opinion, that an overt Act, as well of this Species of High Treaſon as of every other, muſt be laid in the County wherein

wherein the Treaſon is charged to have been committed; and that no Evidence can be given of an overt Act in any other County, until the overt Act, laid in the County wherein the Treaſon is charged to have been committed, has been proved.

39. In an Indictment, whether it be againſt a natural-born Subject, or an Alien, for an Offence declared to be High Treaſon by the 25 *Ed.* 3 *ſt.* 5. *c.* 2. it muſt be expreſsly alledged, that the Offence was *contra Ligeantiæ ſuæ Debitum*; for as this Statute does not make any Offence High Treaſon, it being only declaratory of what Offences were ſo at the Common Law, every Offence, thereby declared to be High Treaſon, continues to be, as it was at the Common Law, an Offence againſt that Allegiance which is due to the King from every Perſon who lives under his Protection. Carth. 318, 319. Tucker's Caſe. Salk 631. S C. Ld. Raym. 1. S. C.

40. But it is not neceſſary to alledge, in an Indictment for an Offence made High Treaſon by a Statute ſubſequent to the 25 *Ed.* 3. *ſt.* 5. *c.* 2. that the Offence was *contra Ligeantiæ ſuæ Debitum*; it being ſufficient to alledge that the Offence was *contra formam Statuti*. Salk. 631. Tucker's Caſe.

41. It is ſaid to be the better Opinion, that it is not neceſſary to alledge, in any Indictment for High Treaſon, that the Offence was *contra naturalem ſuum Dominum*, or *contra naturalis ſuæ Ligeantiæ Debitum*; and it is added, that it is the ſafer Way, even in an Indictment againſt a natural-born Subject to alledge, that the Offence was *contra Ligeantiæ ſuæ Debitum*. Foſt. 186.

42. If it be alledged, in an Indictment againſt an Alien for High Treaſon, that the Offence was *contra naturalem ſuum Dominum*, or *contra naturalis Ligeantiæ ſuæ Debitum*, the Indictment is bad; for, although a local Allegiance be due from an Alien to the Prince under whoſe Protection he lives, a natural Allegiance is not due from him. 7 Rep. 7. Calvin's Caſe. 4 St. Tr. 688.

43 By the 7 *W.* 3. *cap.* 3. *par.* 9. it is enacted, "That no Indictment "for High Treaſon, whereby Corruption of Blood may be made, nor any "Proceſs or Return thereupon, ſhall be quaſhed on the Motion of the "Priſoner or his Counſel, for miſwriting, miſſpelling, or falſe or im-"proper Latin, unleſs Exception concerning the ſame ſhall be made, in "the Court where ſuch Indictment ſhall be tried, by the Priſoner or his "Counſel aſſigned, before any Evidence is given in open Court upon the "Indictment."

44. The Conſtruction hath been, that Exceptions grounded on the Errors mentioned in this Statute, muſt be taken before Plea pleaded, and in *Vaughan*'s Caſe, in *Sullivan*'s Caſe, and in *Layer*'s Caſe, the Court refuſed to hear ſuch Exceptions after pleading. It is true, that in *Cranburn*'s Caſe, the Court did permit ſuch Exceptions to be taken after pleading, and in *Rookwood*'s after the Jury were ſworn: But it ought to be remembered, that theſe were Indulgencies to the Priſoners upon a new Statute, and before the Practice was ſettled to the contrary, as it now is. Foſt. 231.

45. By the 7 *Ann. cap.* 21. *par.* 1. and *par.* 3. it is enacted, "That all "High Treaſons, hereafter committed within *Scotland*, ſhall be inquired "of in *Scotland* in ſuch Manner as is uſed in *England*."

46. If a Wife join with a Stranger in murdering her Huſband, they may both be indicted in the ſame Indictment; for as the Charge in the Indictment, is that *felonice, proditorie, & ex Malitia præcogitata murdraverunt*, the Indictment is good as to both, *reddendo ſingula ſingulis*, and conſequently the Wife may be found guilty of Petit Treaſon, and the Stranger of Murder. Foſt. 329.

(Cc) Of the Trial of Treaſon.

3 Inſt. 11. 1. AT the Common Law Courts of Admiralty claimed an excluſive Juriſdiction of all Offences committed in, or upon, the Sea.

2. But by the 28 *Hen.* 8. *cap.* 15. *par.* 1. it is enacted, "That all "Treaſons hereafter to be committed in, or upon, the Sea, or in any "Place where the Admiral or Admirals have or pretend to have Juriſdic- "tion, ſhall be heard and determined in ſuch Shires and Places in the "Realm, as ſhall be limited by the King's Commiſſion, to be directed for "the ſame in like Form and Condition, as if any ſuch Offence had been "committed or done in, or upon, the Land."

H. P. C. 15, 203. 3. At the Common Law High Treaſon, committed out of the Realm, could only be tried in the County wherein the Offender had Land.

Ante, p. 143, 144. 4. The Clauſes of the different Statutes, by which it is enacted, that High Treaſon committed out of the Realm may be inquired of in any *Engliſh* or *Scotch* County, have been already mentioned.

5. It is ſufficient to ſay in this Place, without repeating thoſe Clauſes, that in every one of them it is enacted, that High Treaſons, committed out of the Realm, may be heard and determined in the County, wherein it may be inquired of.

6. By the 33 *Hen.* 8. *cap.* 23. *par.* 1. it is enacted, "That if any Per- "ſon or Perſons, being examined by the King's Council or three of "them, upon any Manner of Treaſon, do confeſs any ſuch Offence, or "the ſaid Council, or three of them, upon ſuch Examination ſhall think "any Perſon ſo examined to be vehemently ſuſpected of any Treaſon; "that then in every ſuch Caſe, by the King's Commandment, his Majeſ- "ty's Commiſſion of *Oyer* and *Terminer* ſhall be made to ſuch Perſons, and "into ſuch Shires and Places, as ſhall be named and appointed by the "King's Highneſs, for the ſpeedy Trial, Conviction or Delivery, of ſuch "Offenders."

3 Inſt. 27. 7. This Statute is virtually repealed by the 1 & 2 *Ph. & M. cap.* 10. by which it is enacted, "That all Trials of Treaſon ſhall be according to "the Courſe of the Common Law of this Realm, and not otherwiſe."

Dyer 286. 8. If a Bill of Indictment of High Treaſon have been found in the County wherein the Offence was committed, it may be removed into the Court of King's Bench, and the Offender may be tried there.

3 Inſt. 27. 9. The Perſon indicted of High Treaſon in the proper County may be tried in a foreign County, before Commiſſioners appointed by a ſpecial Commiſſion; for this is warranted by the Courſe of the Common Law.

3 Inſt. 27. H. P. C. 234. 10. But the Jurors muſt, in ſuch Caſe, be of the County wherein the Offence was committed; becauſe this is required by the Common Law.

3 Inſt. 27. 11. If a Man be indicted of High Treaſon, he may, at this Day, as he might have done at the Common Law, plead a foreign Plea, and be tried in the foreign County: But a foreign Plea cannot be pleaded to an Indict- ment for Petit Treaſon.

12. By the 7 *W.* 3. *cap.* 3. *par.* 1. it is enacted, "That every Per- "ſon, that ſhall be indicted for High Treaſon, whereby any Corruption "of Blood may be made, ſhall have a true Copy of the whole Indictment, "but not the Names of the Witneſſes, delivered to him five Days at the "leaſt before he ſhall be tried for the ſame, whereby to enable him to "adviſe with Counſel thereupon, to plead and make his Defence, his "Attorney or Agent requiring the ſame, and paying the Officer his reaſon-

"able

" able Fee for Writing thereof, not exceeding five Shillings for the Copy " of ſuch Indictment."

13. It was holden, at a Meeting of the Judges, on the twelfth Day of *January* one thouſand ſeven hundred and ſeven, to conſider of ſome Things relative to the intended Trial of *Gregg*, that it is the ſafer Way to deliver a Copy of the Caption, as well as of the Body, of an Indictment for High Treaſon; and that the five Days ought to be excluſive both of the Day of Delivery and the Day of Trial. MS. Rep. Gregg's Caſe.

14. As the Intention of this Clauſe, in granting a Copy of an Indictment for High Treaſon, is merely for the Sake of enabling the Perſon indicted to plead, it has been holden, that no Perſon, after having pleaded to an Indictment, is intitled to have a Copy thereof. Salk. 153, 634.

15. No Exception can be taken to the Fulneſs of the Copy of an Indictment for High Treaſon which has been delivered, after the Indictment has been pleaded to. 4 St. Tri. 646. Rookwood's Caſe.

16. By 7 *W.* 3. *cap.* 3. *par.* 1. it is enacted, " That every Perſon, that " ſhall be indicted, arraigned or tried, for High Treaſon, whereby any " Corruption of Blood may be made, ſhall be admitted to make his full " Defence by Counſel learned in the Law; and in Caſe any Perſon ſo in- " dicted ſhall deſire Counſel, the Court before whom ſuch Perſon ſhall be " tried, or ſome Judge of that Court, ſhall and is hereby authorized and " required, immediately upon his Requeſt, to aſſign to ſuch Perſon ſuch " Counſel, not exceeding two, as the Perſon ſhall deſire, to whom ſuch " Counſel ſhall have free Acceſs at all ſeaſonable Hours; any Law or " Uſage to the contrary notwithſtanding."

17. By *par.* 12. it is provided, " That neither this Act, nor any Thing " therein contained, ſhall any Ways extend to any Impeachment or other " Proceeding in Parliament, in any Kind whatſoever."

18. But by 20 *Geo.* 2. *cap.* 30. it is enacted, " That every Perſon, " who ſhall be impeached by the Commons of *Great Britain* of any High " Treaſon, whereby any Corruption of Blood may be made, ſhall be re- " ceived and admitted to make his full Defence by Counſel learned in the " Law, not exceeding two Counſel, who ſhall be aſſigned for that Pur- " poſe, on the Application of the Party impeached, at any Time after the " Articles of Impeachment ſhall be exhibited by the Commons."

19. By the 7 *W.* 3. *cap.* 3. *par.* 7. it is enacted, " That every Perſon, " who ſhall be indicted for High Treaſon, whereby any Corruption of " Blood may be made, ſhall have a Copy of the Panel of the Jurors who " are to try him duly returned by the Sheriff, and delivered unto him two " Days at the leaſt before he ſhall be tried."

20 But by *par.* 13. it is provided, " That this Act, nor any Thing " therein contained, ſhall extend to any Proceedings upon an Indictment " for counterfeiting his Majeſty's Coin, his Great Seal, or Privy Seal, his " Privy Signet or Sign Manual."

21. By the 7 *An. cap.* 21. *par.* 11. it is enacted, " That from and after " the Deceaſe of the Perſon who pretended to be Prince of *Wales* during " the Life of the late King *James*, and ſince pretends to be King of *Great* " *Britain*, and at the End of three Years after the Succeſſion to the " Crown upon the Demiſe of her Majeſty ſhall take Effect, as the ſame " is and ſtands limited, by an Act made in the firſt Year of the Reign of " their late Majeſties King *William* and Queen *Mary*, intituled, *An Act* " *for declaring the Rights and Liberties of the Subject, and ſettling the Suc-* " *ceſſion of the Crown*, and by one other Act, made in the twelfth Year of " the Reign of his late Majeſty King *William* the Third, intituled, *An* " *Act for the further Limitation of the Crown, and better ſecuring the Rights*

" *and Liberties of the Subject*, when any Perſon is indicted for High Trea-
" ſon, a Liſt of the Witneſſes that ſhall be produced on the Trial for
" proving the ſaid Indictment, and of the Jury, mentioning the Names,
" Profeſſion and Place of Abode, of the ſaid Witneſſes and Jurors, be
" given at the ſame Time that the Copy of the Indictment is delivered
" to the Party indicted; and that Copies of all Indictments for the
" Offences aforeſaid, with ſuch Liſts, ſhall be delivered to the Party in-
" dicted ten Days before the Trial, and in the Preſence of two or more
" credible Witneſſes; any Law or Statute to the contrary notwith-
" ſtanding."

22. By the 7 *An. cap.* 21. *par.* 1. and *par.* 3. it is enacted, " That all
" High Treaſons hereafter committed within *Scotland* ſhall be heard and
" determined in *Scotland*, in ſuch Manner as is uſed in *England*."

3 Inſt. 14. Sty. 104. 23. If a Perſon arraigned upon an Indictment for High Treaſon ſtood mute, his Guilt was to be taken *pro Confeſſo*; and the ſame Judgment was always to be given, as if he had been convicted.

24. And ſince the 12 *Geo.* 3. *c.* 20. ſtanding mute does in the Caſe of Petit Treaſon amount to a Confeſſion of Guilt.

25. By the 33 *Hen.* 8. *cap.* 23. *par.* 3. it is enacted, " That Peremptory
" Challenges ſhall not from henceforth be admitted, or allowed, in any
" Caſe of High Treaſon."

3 Inſt. 27. 26. But it being by the 2 *Ph. & M. cap.* 10. enacted, " That all Trials
" of Treaſons ſhall be according to the Courſe of the Common Law, and
" not otherwiſe," the Right of challenging peremptorily in Caſes of High Treaſon, which was incident to a Trial at the Common Law, is thereby virtually reſtored.

(Dd) Of the Evidence of Treaſon.

1. BY the 7 *W.* 3. *cap.* 3. *par.* 7. it is enacted, " That every Perſon,
" who ſhall be indicted for High Treaſon, whereby any Cor-
" ruption of Blood may be made, ſhall have the like Proceſs of the Court
" where he ſhall be tried, to compel his Witneſſes to appear for him at
" ſuch Trial, as is uſually granted to compel Witneſſes to appear againſt
" him."

2. It was not the Uſage heretofore, to examine the Witneſſes produced on the Behalf of a Perſon indicted of Treaſon upon Oath.

3. But by the 7 *W.* 3. *cap.* 3. *par.* 1. it is enacted, " That every Per-
" ſon who ſhall be indicted for High Treaſon, whereby any Corruption of
" Blood may be made, ſhall be admitted to make any Proof that he can
" produce by lawful Witneſs or Witneſſes, who ſhall then be upon Oath,
" for his juſt Defence; any Law, Statute, or Uſage to the contrary not-
" withſtanding."

4. And by the 1 *Ann. ſtat.* 2. *cap.* 9. *par.* 3. it is enacted, " That every
" Perſon, who ſhall be produced or appear as a Witneſs on the Behalf of
" the Priſoner upon any Trial for Treaſon, before he be admitted to
" depoſe or give any Manner of Evidence, ſhall firſt take an Oath to
" depoſe the Truth, the whole Truth, and Nothing but the Truth, in
" ſuch Manner as the Witneſſes for the Queen are by Law obliged
" to do."

5. By

5. By the 8 & 9 *W.* 3. *cap.* 25. *par.* 5. it is enacted, "That if any Puncheon, Dye, Stamp, Edger, Cutting-Engine, Preſs, Flaſk, or other Tool, "Inſtrument or Engine, uſed or deſigned for coining or counterfeiting Gold "or Silver Money, or any Part of ſuch Tool or Engine, ſhall be hid or "concealed in any Place, or found in the Houſe, Cuſtody or Poſſeſſion, "of any Perſon whatſoever, not then employed in the Coining of Money "in ſome of his Majeſty's Mints, nor having the ſame by ſome lawful "Authority; that then it ſhall be lawful for any Perſon diſcovering the "ſame to ſeize, and he is hereby required to ſeize the ſame, and to carry "it forthwith to ſome Juſtice of the Peace of the County, City or Place, "where the ſame ſhall be ſo ſeized, to be produced in Evidence againſt "any Perſon, who ſhall be proſecuted for any Offence by this Act made "High Treaſon."

6. It has been holden, that Papers, found in the Cuſtody of a Perſon indicted for High Treaſon, may, although ſuch Papers are not in his own Hand-Writing, be read as Evidence againſt him. 6 St. Tr. 281, 321, 322. Layer's Caſe.

7. And it ſeems to be ſettled, that Papers may in Conſideration of Law be in the Cuſtody of a Perſon, although they are not actually found upon him.

8. Lord *Preſton* together with *Aſhton*, *Elliot* and a Servant of Lord *Preſton*'s were found concealed under the Quarter-Hatches of a Ship, in which they were going abroad. In the Place, wherein they were concealed, a Packet was ſeen lying upon the Ballaſt, with a Piece of Lead faſtened to it; and two Seals were found lying near the Packet. Upon one of the Seals was Lord *Preſton*'s Coat of Arms, the other was a Seal belonging to the Office of Secretary of State, which Office had been enjoyed by Lord *Preſton* in the late Reign. It appeared likewiſe, that the Packet was taken up by *Aſhton*, who was tried for the ſame High Treaſon for which Lord *Preſton* was tried, and put into his Boſom; from whence it was afterwards taken. It was holden, that this Packet was ſo in the Cuſtody of Lord *Preſton*, that the Papers therein contained might be read as Evidence againſt him. 4 St. Tr. 431, 445, 446, 450. Lord Preſton's Caſe.

9. In a very late Caſe, divers Papers were found in a Bureau in the Priſoner's Apartment. With theſe were found divers Seals, with one of which every one of ſeven Letters, proved to be in the Priſoner's Hand-Writing, appeared to have been ſealed. It appeared alſo, that the Priſoner had the general Uſe of the Bureau, which belonged to the Perſon of whom he hired the Apartment; but it likewiſe appeared, that this Perſon had been ſometimes ſeen to open it in the Priſoner's Abſence. It was holden, that theſe Papers were ſo in the Cuſtody of the Priſoner, that they might be read as Evidence againſt him. MS. Rep. Henſey's Caſe, Trin. 31 G. 2.

10. By the 5 *Ed.* 6. *cap.* 11 *par.* 12. it is enacted, "That no Perſon or "Perſons, ſhall be indicted, arraigned, condemned, convicted or attainted, "for any Treaſons that now be or hereafter ſhall be perpetrated, com-"mitted or done, unleſs the Offender or Offenders be thereof lawfully "accuſed by two lawful Accuſers; which ſaid Accuſers, at the Time of "the Arraignment of the Party, if they be then living, ſhall be brought "in Perſon before the Party ſo accuſed, and avow and maintain that they "have to ſay againſt the ſaid Party, to prove him guilty of the Treaſon "contained in the Bill of Indictment; unleſs the ſaid Party arraigned ſhall "willingly without Violence confeſs the ſame."

11. It ſeems to be the better Opinion, that this Statute is not repealed by the 1 & 2 *Ph. & Mar. cap.* 10. by which it is enacted, "That all Trials "of Treaſons ſhall be according to the Courſe of the Common Law:" By which one Witneſs was ſufficient in any Caſe. 3 Inſt. 25 Foſt. 235, 236, 237, 238, 239.

12. But however that may be, it is by the 7 *W.* 3. *cap.* 3. *par.* 2. enacted, "That no Perſon ſhall be tried or attainted of High Treaſon,

"whereby

" whereby any Corruption of Blood may be made, but by and upon the " Oaths and Teſtimony of two lawful Witneſſes, either both of them to " the ſame overt Act, or one of them to one, and the other to another " overt Act of the ſame Treaſon; unleſs the Party indicted, and ar- " raigned, or tried, ſhall willingly without Violence in open Court con- " feſs the ſame, or ſhall ſtand mute or refuſe to plead, or in Caſes of " High Treaſon ſhall peremptorily challenge above the Number of Thirty- " five of the Jury; any Law, Statute, or Uſage to the contrary notwith- " ſtanding.

5 St. Tr. 38. Vaughan's Caſe. Raym. 207.

13. In an Indictment for compaſſing or imagining the King's Death, the being armed with a Dagger for the Purpoſe of killing the King was laid as one overt Act, and the being armed with a Piſtol for the ſame Purpoſe as another overt Act. It was holden, that proving one of the overt Acts by one Witneſs, and the other by a different Witneſs, was Proof by two Witneſſes within the Meaning of the 7 *W.* 3. *c.* 3.

MS. Rep. Gregg's Caſe.

14. At a Meeting of the Judges, on the twelfth Day of *January* one thouſand ſeven hundred and ſeven, to conſider of ſome Matters relative to the intended Trial of *Gregg* for High Treaſon, *Holt* Chief Juſtice, *Powel* Juſtice, *Powis* Juſtice, *Smith* Juſtice, *Dormer* Juſtice, and *Bury* Juſtice, were of Opinion, that the Priſoner's Confeſſion, although not made in Court, if proved by two Witneſſes to have been voluntarily made, notwithſtanding what is contained in the 7 *W.* 3. *cap.* 3. *par.* 2. was ſufficient Evidence to convict upon: But *Trevor* Chief Juſtice was of a contrary Opinion: and *Tracy* Juſtice doubted.

Foſt. 241.

15. But at a Conference of the Judges, in the Year one thouſand ſeven hundred and ſixteen, it was agreed, that only a Confeſſion upon an Arraignment is within the Meaning of the 5 & 6 *Ed.* 6. *c.* 11. and that this is ſo becauſe it amounts to a Conviction.

Foſt. 241, 242.

16. And it ſeems to be the better Opinion, that if the Confeſſion of the Priſoner be not made in open Court, it ought only to be admitted in Corroboration of other Evidence, and that two Witneſſes beſides Confeſſion are neceſſary to a Conviction.

17. By the 7 *W.* 3 *cap.* 3. *par.* 4. it is enacted, " That if two or more " diſtinct Treaſons of divers Heads or Kinds ſhall be alledged in one Bill " of Indictment, one Witneſs produced to prove one of the ſaid Treaſons, " and another produced to prove another of the ſaid Treaſons, ſhall not " be deemed or taken, to be two Witneſſes within the Meaning of this " Act."

5 Stat. Tr. 38. Vaughan's Caſe.

18. As it is only made neceſſary by the 7 *W.* 3. *cap.* 3. to prove one overt Act of High Treaſon, by which Corruption of Blood may be made, by two Witneſſes, or two overt Acts of the ſame Treaſon by two Witneſſes, every other Fact collateral to an overt Act of High Treaſon may be proved by one Witneſs.

Ibid.

19. It has been holden, that if it be neceſſary to prove a Perſon indicted for High Treaſon to be one of the King's Subjects, it is ſufficient to prove this by one Witneſs.

Foſt. 233, 239, 337.

20. It ſeems to be the better Opinion, that two Witneſſes are neceſſary, to convict a Perſon indicted for Petit Treaſon, for that the 5 & 6 *Ed.* 6. *c.* 11. is not as to this repealed by the 1 & 2 *Ph.* & *M. c.* 10.

21. By the 7 *W.* 3. *cap.* 3. *par.* 8. it is enacted, " That no Evidence " ſhall be admitted or given of any overt Act of High Treaſon, which is " not expreſsly laid in the Indictment, againſt any Perſon whatſoever."

4 St. Tr. 38. Vaughan's Caſe.

22. But it is laid down, that where one overt Act of Treaſon, not laid in the Indictment, conduces to the Proof of another therein laid, Evidence may be given of that overt Act.

23. If

23. If the overt Act of Treaſon, laid in the Indictment, be a Conſultation to kill the King, any acting in Purſuance of the Conſultation may be given in Evidence; for this does not only prove a Conſent to the killing of the King, but it is moreover a Proof of the overt Act laid. 5 St. Tr. 38. Vaughan's Caſe. Salk 634.

(Ee) Of the Judgment of Treaſon.

1. BY the 7 *W.* 3. *cap.* 3. *par.* 9. it is enacted, "That no miſwriting, "miſſpelling, or falſe or improper Latin, ſhall, after Conviction "upon an Indictment for High Treaſon, be any Cauſe to ſtay or arreſt "Judgment thereupon."

2. But by the ſame *par.* it is provided, "That any Judgment given upon "ſuch Indictment ſhall be liable to be reverſed upon a Writ of Error, in "the ſame Manner as if this Act had not been made."

3. If a Man be convicted of High Treaſon, that Judgment which is called the ſolemn Judgment is in ſome Caſes to be pronounced, in others that which is called the leſs ſolemn Judgment.

4. But if a Woman be convicted of High Treaſon, the Judgment to be pronounced in all Caſes is, That ſhe be carried to the Priſon from whence ſhe came, and be drawn from thence to the Place of Execution; and that ſhe be there burnt.

5. The ſolemn Judgment of High Treaſon is always to be pronounced by the Chief Judge of the Court. Kel. 11.

6. The Form of the ſolemn Judgment is different in different Books. Nor is this to be wondered at: For it appeared upon great Search of Records, in the Caſe of *Walcot*, that before the Time of *Henry* the Seventh the Form of this Judgment was very uncertain: There being ſcarce two Judgments to be found of which the Form was the ſame. Carth. 319. Walcot's Caſe.

7. The following ſeems from divers Books to be the moſt approved Form of the ſolemn Judgment: That the Perſon convicted be carried to the Priſon from whence he came, and be drawn from thence to the Place of Execution; that he be there hanged by the Neck, and be cut down whilſt he is alive; that his Bowels be cut out of his Body, and be burnt before his Face; that his Head be ſevered from his Body, and his Body be divided into four Quarters; and that his Head and Quarters be diſpoſed of as the King pleaſes. Staundf. P. C. Lib. 3. c. 19. 3 Inſt. 210. 1 H. H. P. C. 350. Carth. 315. Kilmarnock's Tr. 38.

8. The King may, by a Warrant under the Great Seal, Privy Seal, Privy Signet or Sign Manual, diſcharge or Pardon ſuch Part of the Puniſhment awarded by the ſolemn Judgment as he pleaſes. 1 H. H. P. C. 351, 384.

9. And it is uſual, when a Nobleman, or other great Man, falls under this Judgment to pardon the whole of the Puniſhment except the beheading. Ibid.

10. According to *Staundford*'s Account, Part of the ſolemn Judgment was heretofore, to be drawn *upon a Hurdle*. Staundf. P. C. Lib. 3. c. 19.

11. But no mention is made by *Coke* Chief Juſtice of drawing upon a *Hurdle*; nor is this mentioned in a modern Judgment. 3 Inſt. 210. Kilmarnock's Tr. 38.

12. And drawing upon a Hurdle does not ſeem ever to have been a neceſſary Part of the ſolemn Judgment; for *Shard* Juſtice once ordered a Man, convicted of High Treaſon, to be drawn without being placed upon any 1 H. H. P. C. 382.

any Thing by Horſes to the Place of Execution: But this Severity is not now uſed; the convicted Perſon being always drawn upon a Hurdle.

Staundf.P.C. Lib. 3. c. 19. 13. Part of the Judgment, according to the Form in *Staundford*, was heretofore, that the Privy Members ſhould be cut off.

3 Inſt. 210. 14. But *Coke* Chief Juſtice does not mention cutting off the Privy Members as any Part of this Judgment; and it appears from ſome modern Judgments, that it is not a neceſſary Part thereof.

Ld. Raym. 1, 2. Tucker's Caſe. 15. A Writ of Error being brought to reverſe an Attainder of High Treaſon, one Error aſſigned was, that the Words *Secreta Membra amputentur* were omitted in the Judgment. *Samuel Eyre* Juſtice was of Opinion, that the Attainder ought not for this Reaſon to be reverſed; becauſe the Omiſſion of theſe Words is warranted by many Precedents. *Giles Eyre* Juſtice ſeemed to think, that theſe Words, as the Practice at that Time was to inſert them, ought to have been inſerted: But by Reaſon of the Multitude of Precedents doubted. *Holt* Chief Juſtice gave no Opinion as to this Point. The Attainder was reverſed for another Reaſon: And no Notice is taken in the Judgment of Reverſal, which was afterwards affirmed by the Houſe of Lords, of the Omiſſion of theſe Words.

Kilmarnock's Tr. 38. 16. It was no Part of a Judgment, pronounced not many Years ago by Lord *Hardwicke* High Steward, that the Privy Members ſhould be cut off.

12 Mod. 95, 96. Walcot's Caſe. Carth. 349. 17. In divers old Caſes, and in ſome Caſes in the Time of *Charles* the Second, the Words *before his Face*, or the Words *whilſt he is alive*, which are holden to be tantamount to the Words *before his Face*, are not inſerted in the Judgments after the Words *and be burnt*.

12 Mod. 95, 96. Walcot's Caſe. 18. But the more general Uſage has been, to inſert the Words *before his Face*, or the Words whilſt *he is alive*; and the Attainder was in *Walcot*'s Caſe reverſed by the Court of the King's Bench, becauſe both theſe Sets of Words were omitted; and the Judgment of Reverſal was affirmed by the Houſe of Lords.

Staundf.P.C. Lib. 3. c. 19. 3 Inſt. 211. 1 H. H.P.C. 351. 19. The leſs ſolemn Judgment of High Treaſon is, That the Perſon convicted be carried to the Priſon from whence he came; and be drawn from thence to the Place of Execution; and that he be there hanged by the Neck, until he be dead.

1 Ventr. 254. Bellew's Caſe. 20. It was in one Caſe doubted, whether, when the leſs ſolemn Judgment of High Treaſon is to be pronounced by the Court of King's Bench, it is to be pronounced by the Chief Juſtice, or as is done in Felonies by the ancient Juſtice, the Judgment was in that Caſe pronounced by the ancient Juſtice: But to avoid all Scruple, it was pronounced over again by the Chief Juſtice.

Staundf.P.C. Lib. 3. c. 19. 3 Inſt. 15. 3 Inſt. 17. 21. It is laid down in two Books, that the ſolemn Judgment ought to be pronounced in every Caſe of High Treaſon, except that of counterfeiting the King's Money contrary to the 25 *Ed.* 3. *ſtat.* 5. *cap.* 2.

22. The Reaſon given, for excepting the Caſe of counterfeiting the King's Money contrary to the 25 *Ed.* 3. *ſtat.* 5. *cap.* 2. is, that as the Judgment for this Offence which was High Treaſon at the Common Law, was only to be drawn and hanged, the ſame Judgment, as that Statute makes no Alteration in the Puniſhment, ought ſtill to be pronounced: But that where an Offence is made High Treaſon by a Statute ſubſequent to the 25 *Ed.* 3. *ſtat.* 5 *cap.* 2. the Judgment ought to be, as it is of all other High Treaſons at the Common Law except that of counterfeiting the King's Money, to be drawn, hanged and quartered.

23. But it ſeems to be the better Opinion, that in ſome other Caſes of High Treaſon, as well as that of counterfeiting the King's Money contrary to the 25 *Ed.* 3. *ſtat.* 5. *cap.* 2. the leſs ſolemn Judgment ought to be pronounced.

24. It

24. It appears, from one Case, that the less solemn Judgment was some Years after the 25 *Ed.* 3. *stat.* 5. *cap.* 2. pronounced in the Case of counterfeiting the Great Seal. 2 H. 4. 25. 1 H. H.P.C. 181.

25. *Coke* Chief Justice does indeed say, in speaking of this Judgment, that it must be misreported. 3 Inst. 15.

26. But *Hale* Chief Justice is of Opinion, that *Coke* Chief Justice was himself mistaken: For that the Judgment, in the Case of counterfeiting the Great Seal, may be either to be drawn and hanged; or to be drawn, hanged and beheaded. 1 H. H.P.C. 352.

27. The Opinion of *Hale* Chief Justice seems to be upon the whole right: But it seems a little strange to say, that either the solemn or the less solemn Judgment may be pronounced in this Case, which is a Latitude unknown to the *English* Law: And the rather, as he had but a few Lines before said, upon the Authority of both *Bracton* and *Fleta*, that at the Common Law the Punishment of counterfeiting the Great Seal was to be drawn and hanged. 1 H. H.P.C. 351.

28. If this were the Punishment at the Common Law of that Offence the Consequence must be, as is laid down by *Coke* Chief Justice in the Case of counterfeiting the King's Money, that as the 25 *Ed.* 3. *st.* 5. *c.* 2. has made no Alteration in the Mode of punishing this Offence, the same Punishment ought to be inflicted upon the Person guilty thereof as was inflicted at the Common Law. 3 Inst. 17.

29. *Hale* Chief Justice has with great Propriety distinguished the Cases upon Statutes subsequent to the 25 *Ed.* 3. *stat.* 5. *cap.* 2. by which divers Offences relative to the Coin have been made High Treasons, from Cases of Offences made High Treason, which were not so at the Time of making that Statute. 1 H. H.P.C. 352.

30. His Distinction is, that in the latter Cases, as in Offences against the Protestant Religion, the solemn Judgment ought to be pronounced: But that in Offences relative to the Coin, although some of these are made High Treasons by Statutes subsequent to the 25 *Ed.* 3 *stat.* 5. *cap.* 2. the less solemn Judgment ought for the following Reasons to be pronounced. Ibid.

31. As these Offences are in *Cognita Materia falsificationis Monetæ*, they are within the Verge of the Crime of falsifying Money; and therefore ought to be punished in the same Way as this Crime is to be punished. Ibid.

32. It is unreasonable to think, that the Legislature could intend to inflict a more severe Punishment upon the Counterfeiters of foreign Coin, or upon the Clippers of the King's Money or foreign Coin, than upon the Counterfeiters of the King's Money. Ibid.

33. In Support of this Distinction divers Cases are mentioned.

34. In one of these it is said to have been agreed by all the Judges, that the less solemn Judgment ought to be pronounced in a Case of clipping the King's Money: Which Offence was made High Treason by the 5 *Eliz.* *cap.* 11. Dyer 230. Wright's Case, Trin. 6 Eliz.

35. In some subsequent Cases of clipping the King's Money, the solemn Judgment was indeed pronounced: But it appears upon looking into all the Cases since *Wright*'s Case, that in much the greater Part of them the less solemn Judgment was pronounced. 1 H. H.P.C. 353.

36. And in one of these it was resolved by all the Judges, except *Vaughan* Chief Justice, after a Consultation had with the Serjeants at *Serjeants-Inn*, that the less solemn Judgment ought to be pronounced in the Case of clipping the King's Money. 2 Lev. 98. Ballow's Case, Hil. 25 Car. 2.

37. It is admitted by *Hale* Chief Justice, that in one Case, which was *Mich.* 16 *Ja.* 1. the solemn Judgment was pronounced upon a Man convicted of counterfeiting the Privy Signet, which Offence was made High Treason by the 1 *Mar. stat.* 2. *cap.* 6. 1 H. H.P.C. 352. 2 Roll. Rep. 50.

38. But

38. But as this Caſe was determined, before the Law was ſettled in *Ballow*'s Caſe as to the Judgment of Offences relative to the Coin, which have been made High Treaſons by Statutes ſubſequent to 25 *Ed.* 3. *ſt.* 5. *cap.* 2. it may be fairly inferred, that, ſo far from being ſufficient to overthrow the Reaſoning of *Hale* Ch. J. and the Caſes mentioned by him, the Caſe is not at this Day Law.

6 St.Tr.655. Staley's Caſe. 39. Judgment of High Treaſon was in one Caſe, upon a Trial at Bar, pronounced upon the Day the Priſoner was convicted.

4 St.Tr.767. Knightley's Caſe. 40. But this Judgment is in a ſubſequent Caſe declared to be an unprecedented one; and it is in the latter Caſe laid down by *Holt* Ch. J. that, if a Priſoner have been convicted of High Treaſon upon a Trial at Bar, the Judgment ought not to be pronounced in leſs than four Days after the Conviction, provided there are ſo many remaining Days in the Term; becauſe the Priſoner ought to have ſo many Days to move in Arreſt of Judgment: And it is added, that, in Caſe there are not four remaining Days in the Term, the Judgment ought to be pronounced upon the laſt Day of the Term.

3 St.Tr.855, 858. Holloway's Caſe. 41. If a Perſon have been attainted upon a Judgment of Outlawry on an Indictment of High Treaſon, no other Judgment is to be pronounced: But a Rule of Court is to be made for his Execution; that Judgment, which is upon Record, being a ſufficient Ground for the awarding of Execution.

Staundf.P.C. Lib 3. c. 19. 3 Inſt. 211. 42. In every Caſe, wherein a Man is convicted of Petit Treaſon, the leſs ſolemn Judgment is to be pronounced.

Ibid. 43. If a Woman be convicted of Petit Treaſon; the Judgment to be pronounced is, That ſhe be carried to the Priſon from whence ſhe came, and be drawn from thence to the Place of Execution; and that ſhe be there burnt.

44. Although hanging be no Part of the Judgment upon a Woman convicted of Petit Treaſon, it is uſual to ſuffer her to be ſtrangled, with the Cord by which ſhe is tied to the Stake, to ſuch a Degree before the Fire is lighted, that if not quite dead, ſhe is inſenſible of Pain.

Foſt. 336. 45. But in the Caſe of *Catharine Hayes*, convicted at the *Old-Baily* in *April* 1726, of the Murder of her Huſband, in whoſe Caſe there were Circumſtances of high and uncommon Aggravation, the Fire was lighted ſo ſoon after her being tied to the Stake, that ſhe was in Fact burnt alive.

TRESPASS.

THE Word Treſpaſs is derived from the *French* Word *Treſpaſſer*, which ſignifies to go beyond what is right.

It follows, that every injurious Act is in the large Senſe of the Word a Treſpaſs.

But as divers injurious Acts are called Felonies, and are diſtinguiſhed by particular Names, as Treaſon, Murder, *&c.* the Word Treſpaſs does not in the legal Senſe thereof, extend to any ſuch injurious Acts.

Some Treſpaſſes are not accompanied with Force.

A Treſpaſs of this Kind is called a Treſpaſs upon the Caſe: And the Method of proceeding againſt the Wrong-Doer is by an Action of Treſpaſs upon the Caſe.

This Action has been already treated of, under the Title *Action upon the Caſe.*

Other Treſpaſſes are accompanied with Force, either actual or implied.

If a Treſpaſs accompanied with actual Force have been injurious to the Publick, the proper Method of proceeding againſt the Wrong-Doer, is by Indictment or Information.

If a Treſpaſs accompanied with actual Force have only been injurious to one or a few Perſons, the Wrong-Doer may in ſome Caſes be proceeded againſt by Indictment or Information, and in all by Indictment; for, although the Injury was done only to one or a few Perſons, as every Treſpaſs accompanied with actual Force amounts to a Breach of the Peace, it is an Offence againſt the Publick.

The Method of proceeding by Indictment or Information, againſt Perſons guilty of ſuch Treſpaſſes as are Offences againſt the Publick, has been ſhewn under the Titles *Indictment* and *Information.*

Beſides being liable to an Indictment or Information, the Perſon guilty of a Treſpaſs accompanied with actual Force, which has been injurious to one or a few Perſons, is liable to an Action of Treſpaſs.

If a Treſpaſs not accompanied with actual Force, have only been injurious to one or a few Perſons, the only Method of proceeding againſt the Wrong-Doer, this not being a publick Offence, is by an Action of Treſpaſs.

The Writ by which an Action of Treſpaſs is commenced, is ſometimes returnable, at other Times it is not.

It is in the Election of the Party injured by a Treſpaſs, to ſue out a Writ of Treſpaſs that is returnable, or one that is not.

The latter Writ is called a Vicontiel Writ: Becauſe the Matter therein complained of is to be determined before the Sheriff to whom the Writ is directed.

As the Vicontiel Writ of Treſpaſs is at this Day very ſeldom ſued out, it is by no Means neceſſary, to go into the Conſideration of the Action thereupon founded.

The Deſign at preſent is, to treat of that Action, which is founded upon the returnable Writ of Treſpaſs.

As the Writ of Treſpaſs which is returnable does always contain the Words *Vi et Armis*, the Action founded thereupon is, to ſpeak with Propriety, *an Action of Treſpaſs Vi et Armis.*

But as ſuch Action is almoſt as frequently called *an Action of Treſpaſs*, as *an Action of Treſpaſs Vi et Armis*, and as it is by the former Name ſufficiently diſtinguiſhable from *an Action of Treſpaſs upon the Caſe*, it is by no Means neceſſary to add, in treating thereof, the Words *Vi et Armis*.

Divers Things relative to an Action of Treſpaſs, as Tender and Bringing Money into Court, Damages, and Coſts, have been treated of, under the Titles *Tender and Bringing Money into Court*, *Damages*, and *Coſts*.

The remaining Matter, which appertains to this Title, ſhall be ranged in the following Order:

(A) In what Caſes an Action of Treſpaſs does in the general lie.

(B) In what Caſes an Action of Treſpaſs lies for an Act, which, although it was in the firſt Inſtance lawful, becomes afterwards a Treſpaſs ab Initio.

(C) By whom an Action of Treſpaſs may be brought.

1. Where the Injury was done to a Perſon.
2. Where the Injury was done to Perſonal Property.
3. Where the Injury was done to Real Property.

(D) For what Injuries to the Perſon an Action of Treſpaſs lies.

1. For a Battery.
2. For an accidental Stroke.
3. For a falſe Impriſonment.

(E) For what Injuries to Perſonal Property an Action of Treſpaſs lies.

1. To live Property.
2. To dead Property.

(F) For what Injuries to Real Property an Action of Treſpaſs lies.

1. To Land.
2. To a Building.

(G) Againſt whom an Action of Treſpaſs may be brought.

1. In the General.
2. For an Injury to Real Property.

(H) In what Court an Action of Treſpaſs may be brought.

(I) Of the Pleadings in an Action of Treſpaſs.

1. Of the Writ.
2. Of the Declaration.

   1. In the General.
   2. Of declaring with a *Continuando*.

3. Of the Plea.

   1. Of pleading in Abatement.
   2. Of pleading in Chief.

      1. The General Iſſue.
      2. A Special Plea.
      3. Both the General Iſſue and a Special Plea.
      4. Of giving Colour.

4. Of the Replication.

   1. In the General.
   2. Of making a new Aſſignment.

(K) Of the Evidence in an Action of Treſpaſs.

(A) In what Caſes an Action of Treſpaſs does in the general lie.

1. WHEREVER an Injury has been received from an Act which was in the firſt Inſtance unlawful, an Action of Treſpaſs lies, although the Act were not accompanied with actual Force, there being in every ſuch Caſe an implied Force. Str. 635. Reynolds v. Clarke. Ld. Raym. 1402. S. C.

2. But where the Injury, which has been received, was the Conſequence of an Act, which was in the firſt Inſtance lawful, an Action of Treſpaſs does not in the general lie, the proper Remedy being an Action upon the Caſe.

3. If one Man fix a Spout for the carrying of Water from his Houſe, and the Water thereby carried fall and do Damage upon the Ground of another, the latter cannot maintain an Action of Treſpaſs; for, as the fixing of the Spout was lawful, the Injury is conſequential. Str. 635. Reynolds v. Clark. Ld. Raym. 1402. S. C.

4. If

Ld. Raym. 1402. Liveridge v. Hodges.

4. If *J. S.* dig a Trench in his own Land or in the Land of a Stranger, by which the Water is diverted from the River of *J. N. J. N.* cannot maintain an Action of Treſpaſs, inaſmuch as he had no Right to complain of the Act done by *J. S.* until the Conſequence thereof was injurious to him.

5. If an Injury be the Conſequence of Non-feaſance, an Action of Treſpaſs does not lie: For, there cannot have been any Force, either actual or implied, where no Act has been done.

Ld. Raym. 188. Shapcott v. Mugford.

6. If the Perſon intitled to Tithe do not, after having received Notice that the Tithe is ſet out, fetch it away in a reaſonable Time, he is liable to an Action upon the Caſe, for the Injury ſuſtained by the lying thereof too long upon the Land: But an Action of Treſpaſs does not lie; becauſe the Injury ariſes from Non-feaſance.

Bro Act. ſur le Caſe, pl. 36. Fitz. N. B. 93.

7. If *J. S.* who ought to repair the Bank of a River, neglect to do it, and for want of its being done the Ground of *J. N.* be overflown; *J. N.* may recover a Satisfaction for the Injury in an Action upon the Caſe: But he cannot maintain an Action of Treſpaſs; becauſe the Injury ariſes from Non-feaſance.

Bro. Treſp. pl. 179.

8. It is ſaid in one Caſe, that if *A.* break the Hedge of *B.* to the Value of Fourpence, and Beaſts of Common of *J. S.* enter through the Breach into the Cloſe of *B.* and do Damage, *B.* ſhall recover Damages for the whole Injury in an Action of Treſpaſs againſt *A.*

Ld. Raym. 273. Courtney v. Collet. Carth. 437. S. C.

9. But it is laid down in another Caſe, that if an Injury, for which the proper Remedy is an Action upon the Caſe, be contained in the Declaration in an Action of Treſpaſs, Judgment ought, in caſe there is a general Verdict for the Plaintiff, to be arreſted: Becauſe the Judgment againſt the Defendant in an Action of Treſpaſs is *quod capiatur pro Fine*, whereas the Judgment againſt the Defendant in an Action upon the Caſe is *quod ſit in Miſericordia.*

Ld. Raym. 273. Courtney v. Collet. Str. 635.

10. If however one Injury, for which the proper Remedy is an Action upon the Caſe, be after alledging an Injury proper for an Action of Treſpaſs, contained in the Declaration in an Action of Treſpaſs under a *Per quod*; Judgment may be given, although there is a general Verdict for the Plaintiff: Becauſe that which comes under the *Per quod* is not conſidered as an independant ſubſtantive Injury, but as laid in Aggravation of Damages.

1 Inſt. 57.

11. It is laid down in one Book, that if the Bailee of Cattle, which have been lent him to plough his Land with, kill any of them, the Owner of the Cattle has an Election to bring an Action of Treſpaſs, or an Action upon the Caſe.

Bro. Act. ſur le Caſe, pl. 99. Bro. Treſp. pl. 295.

12. But it is laid down in other Books, that the Bailee of Cattle who has killed any of them, is not liable to an Action of Treſpaſs, becauſe he came lawfully to the Poſſeſſion of the Cattle; the proper Remedy being an Action upon the Caſe.

Hob. 180. Wheatley v. Stone.

13. It is in one Book laid down, that the Party injured by a Reſcue may have either an Action of Treſpaſs or an Action upon the Caſe.

Sayer 184. Moir v. Munday.

14. An Action of Treſpaſs does not lie for making an exceſſive Diſtreſs, in caſe there were a Right to diſtrain, the Remedy being an Action upon the Statute of *Marlbridge*: But, if there were no Right to diſtrain, an Action of Treſpaſs lies.

(B) In what Cases an Action of Treſpaſs lies for an Act, which, although it was in the firſt Inſtance lawful, becomes afterwards a Treſpaſs ab Initio.

1. IT has been ſhewn under the laſt Head, that an Injury, which has been received from an Act which was in the firſt Inſtance lawful, is not a Treſpaſs.

2. But in ſome Caſes an Act, which was in the firſt Inſtance lawful, becomes afterwards a Treſpaſs *ab Initio*.

3. Wherever the Perſon, who at firſt acted with Propriety under an Authority or Licenſe given by Law, does afterwards abuſe the Authority or Licence, he becomes a Treſpaſſer *ab Initio*.

4. If *J. S.* who has diſtrained a Beaſt Damage-feaſant, afterwards kill or uſe the Beaſt, he becomes a Treſpaſſer *ab Initio*. He had by Law an Authority to diſtrain the Beaſt: But as this extended only to the keeping of it as a Pledge, in order to enforce the making of Satisfaction for the Damage, the killing or uſing of the Beaſt was an Abuſe of the Authority. 8 Rep. 146. The Six Carpenters Caſe. Bro. Treſp. pl. 29. pl. 273. pl. 350.

5. But every intermeddling with the Thing diſtrained does not amount to ſuch an Abuſe of the Authority to diſtrain, as to make the Diſtrainer a Treſpaſſer *ab Initio*.

6. If a Man, who has diſtrained Armour, ſcower it in order to preſerve it from Ruſt, he does not become a Treſpaſſer *ab Initio*: For this, far from being injurious, is beneficial to the Owner. Cro. Eliz. 783. Duncomb v. Reeve.

7. But if a Man, after having diſtrained raw Hides, tan them, he becomes notwithſtanding they would otherwiſe have rotted, a Treſpaſſer *ab Initio*: Becauſe this, however it may at firſt Sight ſeem to be a Benefit, is an Injury to the Owner; for he can never be ſure of having his own Hides again, the Nature of them being ſo changed by the Tanning that they cannot be known. Ibid.

8. A Conſtable, who had the Warrant of a Juſtice of the Peace to ſearch the Houſe of *J. S.* for ſtolen Goods, pulled down the Clothes of a Bed in which there was a Woman, and attempted to ſearch under her Shift. It was holden, that by this indecent Abuſe of his Authority he became a Treſpaſſer *ab Initio*. Clayt. 44. Ward's Caſe.

9. The Law gives every Man a Licence of going into an Inn at ſeaſonable Times: yet if a Man, who goes lawfully into an Inn, be afterwards guilty of an injurious Act therein, he becomes a Treſpaſſer *ab Initio*: Becauſe this is an Abuſe of the Licence. 8 Rep. 146. The Six Carpenters Caſe. Bro. Treſp. pl. 359.

10. By the 11 *Geo.* 2. *cap.* 19. *par.* 19. it is enacted, "That where any "Diſtreſs ſhall be made for any Rent juſtly due, and any unlawful Act "ſhall be afterwards done by the Party diſtraining, or by his Agent the "Diſtreſs ſhall not be therefore deemed unlawful, nor the Party making "it a Treſpaſſer *ab Initio*."

11. By the 17 *Geo.* 2. *cap.* 38. *par.* 8. it is enacted, "That where any "Diſtreſs ſhall be made by an Overſeer, by Virtue of a Warrant of Diſtreſs, "for any Money juſtly due for the Relief of the Poor, the Party diſtraining "ſhall not be deemed a Treſpaſſer *ab Initio* on the Account of any Irregu-"larity done by ſuch Party."

12. It is in the general true, that a Man, who has been only guilty of a negative Abuſe of an Authority or Licence given by Law, does not thereby become a Treſpaſſer *ab Initio*: Becauſe he has only been guilty of a Non-feaſance.

13 If

8 Rep. 146. The Six Carpenters Case. Ld. Raym. 188.

13. If *J. S.* who has diſtrained a Beaſt Damage-feaſant, refuſe to deliver it upon a Tender of Amends before the impounding thereof, this is a negative Abuſe of the Authority given by Law to diſtrain; and the Owner of the Beaſt may recover Damages for the Detention: But as the Injury ariſes from a Non-feaſance, *J. S.* does not become a Treſpaſſer *ab Initio*.

8 Rep. 146. The Six Carpenters Case.

14. If a Man, who went lawfully into an Inn, refuſe to pay for the Liquor he has called for, this is a negative Abuſe of a Licence given by Law to go into an Inn: But the Man does not become a Treſpaſſer *ab Initio*.

45. But in ſome Caſes a Man, who has been only guilty of a negative Abuſe of an Authority or Licence given by Law, does become a Treſpaſſer *ab Initio*.

Bro. Faux. Impr. pl. 5. pl. 7. pl. 12. pl. 23. 1 Jon. 378. Salk. 409. Ld. Raym. 632. Cro. Car. 446.

16. If a Sheriff have not returned a Writ which ought to have been returned, he becomes, although this be only a Non-feaſance, a Treſpaſſer *ab Initio*, as to every Thing which has been done under the Writ.

Bro. Faux. Impr. pl. 5. pl. 22. 1 Jon. 378. Cro. Car. 446.

17. If a Bailiff have, by Virtue of a Warrant from a Sheriff, executed a Writ which ought to have been returned, he does not, although the Writ has not been returned, become a Treſpaſſer *ab Initio*: For it would be unreaſonable to puniſh the Bailiff for the Default of returning the Writ; which could only be returned by the Sheriff.

2 Roll. Abr. 563. pl. 18. Ld. Raym. 632.

18. But if the Bailiff of an inferior Court have not returned a Writ which ought to have been returned, he becomes a Treſpaſſer *ab Initio*, as to every Thing which has been done under it: Becauſe he is the principal Officer, and not, as is the Caſe of a Bailiff acting under a Warrant from a Sheriff, a ſubordinate one; and conſequently it was his Duty to return the Writ.

19. The Perſon who is guilty of an Abuſe of an Authority in Fact, does not thereby become a Treſpaſſer *ab Initio*.

Bro. Treſp. pl. 295. pl. 327. Bro. Act. ſur le Caſe, pl. 99.

20. If the Bailee of a Beaſt, which was delivered to him to be kept, kill or uſe it, he is liable to make Satisfaction for the Abuſe of the Authority given by the Owner of the Beaſt: But he does not thereby become a Treſpaſſer *ab Initio*.

1 Inſt. 142, 143. Perk. ſ. 691.

21. If a Beaſt, which has been diſtrained for a Rent-Charge, be killed or uſed by the Diſtrainer, he does not become a Treſpaſſer *ab Initio*: Becauſe the Diſtreſs muſt in this Caſe be made under an Authority in Fact; for an Authority to diſtrain is not, as it is to a Rent-Service, incidental to a Rent-Charge, but muſt always have been given by the Grantor thereof.

8 Rep. 146. The Six Carpenters Case.

22. The Reaſon of the Difference, between the Caſe of an Abuſe of an Authority in Fact and that of an Abuſe of an Authority given by Law, is in one Book ſaid to be, that the Abuſe in the latter Caſe is deemed a Treſpaſs *ab Initio*: Becauſe the Law intends from the ſubſequent tortious Act, that there was from the Beginning a Deſign to be guilty of an Abuſe of the Authority.

23. But this Reaſon, which applies equally to both Caſes, is by no Means concluſive: For it may be as well intended, in the Caſe of an Authority in Fact, from the ſubſequent tortious Act, that there was from the Beginning a Deſign of being guilty of an Abuſe thereof. Perhaps the Difference between the two Caſes may be better accounted for in the following Manner:

24 In the one, where the Law has given an Authority, it ſeems reaſonable, that the Law ſhould, in order to ſecure ſuch Perſons as are the Objects thereof from Abuſe of the Authority, when it is abuſed make every Thing done void; and leave the Abuſer in the ſame Situation, as if he had done every Thing without any Authority. And this agrees with the Maxim, *Actus Legis nemini facit Injuriam*.

25. In

25. In the other Caſe, where a Man, who was under no Neceſſity of giving an Authority to any Perſon, has thought proper to give an Authority to a certain Perſon, and this Perſon is guilty of an Abuſe of the Authority, there is no Reaſon that the Law ſhould interpoſe, ſo as to make every Thing done under it void: Becauſe it was his own Folly, to truſt a Perſon with an Authority who has ſhewn himſelf not fit to be truſted therewith. The Interpoſition of the Law in ſuch Caſe would moreover be contrary to the Maxim, *Vigilantibus non Dormientibus ſervit Lex.*

(C) By whom an Action of Treſpaſs may be brought.

1. Where the Injury was done to a Perſon.

1. ONLY the Perſon, to whom the Injury was done, can maintain an Action of Treſpaſs for a perſonal Injury.

2. If a Son or Daughter have been falſely impriſoned, neither the Father nor the Mother can maintain an Action of Treſpaſs. Cro. Eliz. 770. Barham *v.* Dennis.

3. If a Daughter have been debauched, her Father may maintain an Action of Treſpaſs: But he can only recover Damages for the Loſs of the Daughter's Service; no Damages being recoverable by him for the perſonal Injury done to the Daughter. Sid. 225. Sippora *v.* Baſſet. Clayt. 133.

4. An Anceſtor, before Tenure by Knight-Service was taken away, could have maintained an Action of Treſpaſs for the taking away of his Heir: But he could only have recovered Damages for the Loſs of the Marriage of the Heir; no Damages being recoverable by him for the perſonal Injury done to the Heir. 3 Rep. 38. Ratcliff's Caſe, 2 Wms. 116, 128. Cro. Eliz. 770.

5. If a Servant have been beaten, no one except himſelf can maintain an Action of Treſpaſs for the Injury done to his Perſon. Bro. Treſp. pl. 131. 2 Roll. Abr. 552. N. pl. 7.

6. And although a Maſter may, where his Servant lawfully retained has been beaten, maintain this Action, he cannot recover any Damages for the perſonal Injury done to the Servant; for his Recovery can only be for the conſequential Damages he has ſuſtained, by the Servant's having been rendered by the Beating incapable, or leſs capable, to perform his Service. Bro. Lab. pl. 29. Bro. Treſp. pl. 131. 2 Roll. Abr. 552. N. pl. 7.

7. If a Wife have been falſely impriſoned, her Huſband may in an Action of Treſpaſs obtain Satisfaction for the Damages he has ſuſtained, by having been deprived of the Company and Comfort of his Wife, and by the Buſineſs of his Houſe having been neglected during her Abſence: But he cannot recover any new Damages for the perſonal Injury done to the Wife. Salk. 119. Ruſſel *v.* Corne. Cro. Ja. 502. Cro. Car. 90.

8. It is indeed true, her Huſband muſt always join with a married Woman in an Action of Treſpaſs for a perſonal Injury done to herſelf: But as this is owing to the Incapacity of a married Woman to ſue alone, unleſs ſhe be intitled by ſpecial Cuſtom ſo to do, or unleſs her Huſband become incapable of ſuing, it is by no Means to be conſidered as an Exception to the general Rule, That only the Perſon to whom the Injury was done, can maintain an Action of Treſpaſs for the perſonal Injury.

2. Where the Injury was done to Perſonal Property.

Bro Treſp. pl. 303. pl 346. Latch 214. 2 Bulſtr. 268.

9. The Perſon, in whom the general Property in a perſonal Chattel is, may maintain an Action of Treſpaſs for the Taking or Injuring of the Chattel by a Stranger, although he have never had a Poſſeſſion in Fact thereof: For a general Property does always draw to it a Poſſeſſion in Law; which is, in the Caſe of a perſonal Chattel, by Reaſon of the Tranſitorineſs of its Nature, ſufficient to found this Action upon.

Bro. Treſp. pl. 303. Latch 214.

10. If the Owner of Goods, which are at *York*, give them to *J. S.* who at the Time of the Gift is in *London*, and before *J. S.* have obtained the actual Poſſeſſion of the Goods a Stranger take them, *J. S.* may maintain an Action of Treſpaſs againſt the Stranger; for by the Gift he acquired a general Property in the Goods.

Bro. Treſp. pl. 216.

11. But if the Bailee of Goods have given them to *J. S.* and a Stranger take them before they are delivered to *J. S.* this Action cannot be maintained by *J. S.* Becauſe by this Gift, it being the Gift of a Perſon who had only a ſpecial Property in the Goods, *J. S.* did not, as they were not delivered to him, acquire any Property in them.

2 Bulſt. 268. Fiſher v. Young.

12. If the Goods of a Teſtator, who has appointed an Executor, are taken by a Stranger before the Teſtator's Will is proved, and afterwards the Executor prove the Will, he may maintain an Action of Treſpaſs for the taking of them: For although an Executor has not any Property in the Goods of his Teſtator until he has proved his Will, when this is done, he acquires a general Property therein from the Time of the Death of his Teſtator.

Bro. Treſp. pl. 25.

13. If a Teſtator have bequeathed certain ſpecifick Goods to *J. S.* the Legatee may bring an Action of Treſpaſs for an Injury done to the Goods by a Stranger, although the Injury was done before they were delivered to him by the Executor: Becauſe the Legatee did, immediately upon the Teſtator's Death, acquire a general Property in the Goods.

Ibid.

14. But if a Teſtator have bequeathed a third Part of his Goods to *J. S.* and ſome of the Teſtator's Goods, before the third Part thereof was delivered to *J. S.* by his Executor, are taken by a Stranger, the Legatee cannot maintain this Action: Becauſe he does not in this Caſe acquire a Property in any of the Teſtator's Goods, until they are delivered to him by the Executor.

Fitz. N. B. 91.

15. If wrecked Goods are thrown on Shore, and before a Seizure thereof is made a Stranger take them away, the Perſon in whom the Right of Wreck is may maintain an Action of Treſpaſs; inaſmuch as a general Property in the Goods was, immediately upon their being thrown on Shore, veſted in him.

2 Roll. Abr. 569. P. pl. 5. Sid. 438.

16. Every Perſon, in whom the general Property in a perſonal Chattel is, may maintain an Action of Treſpaſs for the Taking or Injuring thereof by a Stranger, although the Treſpaſs was committed, whilſt the Chattel was in the Poſſeſſion of another, who had a ſpecial Property therein.

2 Roll. Abr. 569. P. pl. 5.

17. If the Goods of *J. S.* which were bailed to *J. N.* are taken from or injured in the Hands of *J. N.* by a Stranger, *J. S.* in whom the general Property ſtill remains, may maintain an Action of Treſpaſs.

Bro. Treſp. pl. 216. pl. 295.

18. But if the Bailee of Goods have delivered them to a Stranger, the Bailor cannot maintain this Action: Becauſe the general Property in the Goods is changed by the Delivery of a Perſon who had a ſpecial Property therein.

Fitz. N. B. 89, 92. 1 Inſt. 89. Bro. Treſp. pl. 83. 4 Rep. 84.

19. Every Perſon, who is anſwerable to another for a Perſonal Chattel in his Poſſeſſion, has ſuch a ſpecial Property in the Chattel as enables him to maintain an Action of Treſpaſs for the Taking or Injuring thereof by a Stranger.

13 Rep. 69. 2 Roll. Abr. 569. pl. 5. pl 7. Sid. 438. 2 Saund. 47.

20. This

20. This Diſtinction was formerly taken: Namely; that if Goods, which have been delivered generally to a Man to be kept, are taken from him by a Stranger, the Bailee may maintain an Action of Treſpaſs, becauſe he is anſwerable for the Goods to the Owner: But that if Goods, which have been delivered to a Man to be kept as he keeps his own, are taken by a Stranger, the Bailee cannot maintain this Action; becauſe he is not anſwerable for the Goods to the Owner. 4 Rep. 84. Southcote's Caſe.

21. But in a modern Caſe, in which *Southcote*'s Caſe and all the old Caſes were conſidered, this Diſtinction is exploded. It is in this Caſe laid down, that the Bailee of Goods, which have been delivered to be kept, is not, although the Delivery were general, anſwerable to the Owner for the Goods, unleſs they are loſt or injured by Neglect or Default of the Bailee; for that it would be very unreaſonable, to make a Man, who receives no Benefit from keeping the Goods of another, anſwerable for the Taking or Injuring thereof, unleſs he have been guilty of Neglect or Default. Ld. Raym. 913, 914, 915. Coggs *v.* Barnard.

22. It ſeems to follow from this Caſe, that the Bailee of Goods, when delivered generally to be kept, cannot maintain an Action of Treſpaſs for the Taking or Injuring of them by a Stranger.

23. If *J. S.* have bailed a Beaſt to *J. N.* for ploughing his Land, and this Beaſt be taken from *J. N.* by a Stranger, *J. N.* may maintain this Action; becauſe, as the Beaſt was delivered to *J. N.* for a Purpoſe beneficial to himſelf, he is anſwerable for it to the Owner. Bro. Treſp. pl. 92. Ld. Raym. 913, 915.

24. If Goods, which have been taken by a Sheriff in Execution, are taken from him by a Stranger, he may maintain an Action of Treſpaſs: Becauſe he is anſwerable for the Goods to the Perſon at whoſe Suit the Execution was. Sid. 438. Wilbraham *v.* Snow. 1 Mod. 31.

25. If Goods of *J. S.* which have been delivered to *J. N.* to be carried for Hire, are taken from *J. N.* by a Stranger, *J. N.* may maintain an Action of Treſpaſs: Becauſe he is anſwerable for the Goods to *J. S.* Salk. 26, 143. 2 Rep. 84. 1 Mod. 31.

26. The Agiſtor of a Beaſt may maintain an Action of Treſpaſs for the Taking or Injuring thereof by a Stranger, whilſt it is upon his Land: Becauſe he is anſwerable for the Beaſt to the Owner. Bro. Treſp. pl. 67. Moor 543.

27. Churchwardens may maintain an Action of Treſpaſs, for the Taking of Goods belonging to their Church by a Stranger during their Churchwardenſhip: Becauſe they are anſwerable for the Goods to their Succeſſors. Fitz N B. 92. 1 Ventr. 89. 1 Mod. 65.

28. And it is ſaid, that Churchwardens may maintain this Action, for the Taking of Goods belonging to their Church by a Stranger during the Churchwardenſhip of their Predeceſſors. Fitz. N. B. 89, 92.

29. But it may be inferred from what is ſaid in another Book, that Churchwardens cannot maintain this Action, for the Taking of Goods belonging to their Church by a Stranger during the Churchwardenſhip of their Predeceſſors. Dyer 48.

30. And the latter ſeems to be the better Opinion; for it is not reaſonable, that Churchwardens ſhould be anſwerable to their Succeſſors for Goods belonging to their Church, which were taken during the Churchwardenſhip of their Predeceſſors.

31. It is moreover certain, that the Churchwardens never had in this Caſe an actual Poſſeſſion of the Goods.

32. It follows, that they never had a ſpecial Property in the Goods; for it is laid down in many Caſes, that no Perſon can have a ſpecial Property in a perſonal Chattel, of which he never had the actual Poſſeſſion.

33. It is upon the Whole clear, that both the Perſon in whom the general Property is, and the Perſon in whom the ſpecial Property is, may maintain an Action of Treſpaſs for the Taking or Injuring of a perſonal Chattel by a Stranger, whilſt it was in the actual Poſſeſſion of the latter.

34. But if either of theſe Perſons have recovered in ſuch Action, this ſhall ouſt the other of his Right of Action: Otherwiſe the Treſpaſſer would be liable to make a ſecond Satisfaction for the ſame Injury. 2 Roll. Abr. 569. P. pl. 5.

Bro. Treſp. pl. 13. 2 Roll. Abr. 552. N. pl. 7.

35. Nor is this Caſe like the Caſe of the beating of a Servant, in which both the Servant and his Maſter may maintain an Action of Treſpaſs; and the Recovery of one ſhall not ouſt the other of his Right of Action.

36. For the two Actions are in the latter Caſe maintained upon quite different Grounds; that of the Servant being to recover a Satisfaction for the Perſonal Injury; that of the Maſter to recover a Satisfaction for the Loſs of Service, which was the Conſequence of the Perſonal Injury.

3. Where the Injury was done to Real Property.

Bro. Treſp. pl 38. pl. 305. pl. 346. 3 Lev. 209. Latch 263. 2 Bulſtr. 268.

37. Only the Perſon, who has the Poſſeſſion in Fact of the Real Property to which an Injury has been done, can maintain an Action of Treſpaſs *Quare Clauſum fregit*: A general Property not being in the Caſe of Real Property, as it is in the Caſe of Perſonal, ſufficient to found this Action upon.

2 Leon. 147. Berry *v.* Goodman. Plowd. 546. 4 Leon. 184.

38. And there muſt not only be a Poſſeſſion in Fact of the Real Property; but it muſt be a lawful one: For an Intruder into Land does not gain by the Intruſion ſuch a Poſſeſſion, as will enable him to maintain an Action of Treſpaſs *Quare Clauſum fregit*.

Bro. Sur. pl. 50. 2 Roll. Abr. 554. 4 Leon. 184.

39. The Perſon in whom the Freehold of Land is, cannot maintain an Action of Treſpaſs *Quare Clauſum fregit*, for an Injury done to the Land whilſt it was in the Poſſeſſion of another.

Plowd. 142. Browning *v.* Beſton.

40. An Heir at Law may make a Leaſe of Land deſcended upon him, before he has entered thereupon; but he cannot maintain an Action of Treſpaſs *Quare Clauſum fregit*, before he has by Entry acquired the Poſſeſſion in Fact.

2 Leon. 147. Berry *v.* Goodman.

41. If a Fine *ſur Conuſance de Droit come ceo* be levied of Land, the Conuſee does thereby immediately obtain a Poſſeſſion in Law: But he cannot maintain an Action of Treſpaſs *Quare Clauſum fregit*, before he has by Entry acquired the Poſſeſſion in Fact.

Plowd. 528. Hare *v.* Bickley.

42. A Parſon cannot maintain an Action of Treſpaſs *Quare Clauſum fregit* for an Injury done to his Church, Church-Yard, or Glebe, before he is inducted; it being the Induction which gives him the Poſſeſſion in Fact of theſe Things.

Bro. Treſp. pl. 365.

43. If a Man, who once had the Poſſeſſion in Fact of a Real Eſtate, quit it or be deprived thereof, he cannot maintain an Action of Treſpaſs *Quare Clauſum fregit* for an Injury done thereto, which was done betwixt the Time of his quitting or being deprived of the Poſſeſſion, and his regaining the ſame by Re-entry.

2 Roll. Abr. 553. S. pl. 4. pl. 5.

44. The Diſſeiſſee of Land cannot maintain an Action of Treſpaſs *Quare Clauſum fregit*, for an Injury done thereto betwixt the Time of the Diſſeiſin and his Re-entry: For he does not, until a Re-entry be made, regain the Poſſeſſion in Fact of the Land.

2 Roll Abr. 531. N. pl. 3.

45. It has been holden, that a Leſſor at Will or for Years of Land, who has after the Determination of the Eſtate at Will or for Years re-entered, may maintain an Action of Treſpaſs *Quare Clauſum fregit*, for an Injury done to the Land during the Continuance of the Eſtate at Will or for Years; becauſe his Reverſion may have been thereby injured.

3 Lev. 209. Biddeford *v.* Onſlow.

46. But it ſeems to be the better Opinion that he cannot: For in another Book it is laid down, that only the Leſſee at Will or for Years of Land can maintain this Action, for an Injury done to the Land during the Continuance

Continuance of the Eſtate at Will or for Years: For that the Remedy of the Leſſor, if the Injury be of ſuch a Kind as to be prejudicial to the Reverſion, is by an Action upon the Caſe.

47. If in a Leaſe for Years of Land there be a Reſervation of the Trees, the Leſſor may maintain an Action of Treſpaſs *Quare Clauſum fregit*, for cutting down or injuring the Trees during the Continuance of the Leaſe: For by the Reſervation of the Trees the Land on which they grow was reſerved, and conſequently the Leſſor has never been out of the Poſſeſſion in Fact thereof. Bro. Treſp. pl. 55.

48. A Leſſee for Years of Land may maintain an Action of Treſpaſs *Quare Clauſum fregit*, for an Injury done to the Land by any Perſon during the Continuance of his Eſtate. 2 Roll. Abr. 551. N. pl. 6. Sid. 347.

49. But a Leſſee at Will of Land can only maintain this Action, where the Injury to the Land, done during the Continuance of his Eſtate, was done by a Stranger. 2 Roll. Abr. 551. N. pl. 3. pl. 4. Sid. 347.

50. For if the Injury were done by a Perſon, who entered under Colour of Title, this Action does not lie. Sid. 347. Geary *v.* Barecroſt.

51. It is laid down in one Book, that a Tenant at Sufferance of Land has not ſuch an Intereſt, as enables him to maintain an Action of Treſpaſs *Quare Clauſum fregit*. Fitzh. Treſp. pl. 10.

52. But it is in other Books laid down, that a Tenant at Sufferance of Land may maintain this Action, for an Injury done by a Stranger to the Land. 2 Roll. Abr. 551. N. pl. 1. 13 Rep. 69.

53. If the Perſon, who is intitled to the Veſture or Herbage of Land, be diſturbed in the Enjoyment thereof, an Action of Treſpaſs *Quare Clauſum fregit* lies. 1 Inſt. 4. Bro. Treſp. pl. 273. 2 Roll. Abr. 552. N. pl. 8. Moor 302.

54. It has been holden, that the Perſon, who is intitled to the Graſs grown upon Land after it has been mown, may maintain an Action of Treſpaſs for ſpoiling the Graſs; But that he cannot maintain an Action of Treſpaſs *Quare Clauſum fregit*. 3 Leon. 213. Hitchcock *v.* Hervey.

55. It is laid down, that no Perſon can maintain an Action of Treſpaſs *Quare Clauſum fregit*, for an Injury done to the Soil of a Highway; for that, when Land is dedicated to the Service of the Publick as a Highway, it ceaſes to be private Property. 1 Bulſtr. 157. Duraud *v.* Child.

56. But it was in a modern Caſe holden, that, although Land be dedicated to the Publick Service as a Highway, the Property of the Soil continues ſo in the Dedicator, that he may maintain this Action. Str. 1004. Lade *v.* Shepherd, Hil. 8 G. 2.

57. A Perſon cannot maintain an Action of Treſpaſs *Quare Clauſum fregit*, for treading down the Graſs growing upon Land in which he has a Right of Common; for, although a Commoner have a Right to take ſuch Graſs by the Mouth of his commonable Cattle, he is not in the Poſſeſſion of the Land. Bro. Treſp. pl. 174. 2 Roll Abr. 552. N. pl. 8.

58. It has been holden, that, although *J. S.* have a Right to a Seat in a Church as belonging to an ancient Meſſuage, he cannot maintain an Action of Treſpaſs for being diſturbed in the Uſe thereof, or for an Injury thereto done: For that the proper Remedy is an Action upon the Caſe. Palm. 46. Dawtrie *v.* Dee.

59. It is not neceſſary, that the Perſon, who brings an Action of Treſpaſs *Quare Clauſum fregit* for an Injury to Land, ſhould be in the actual Poſſeſſion thereof at the Time of bringing the Action.

60. If an Injury were done to the Land of *J. S.* while he was in the actual Poſſeſſion thereof, and *J. S.* afterwards quit the Poſſeſſion, an Action of Treſpaſs *Quare Clauſum fregit* may be brought by him. Bro. Treſp. pl. 12. 2 Roll. Abr. 569. Plowd. 431.

61. The

Bro. Treſp. pl. 46. 2 Roll. Abr. 553. S. pl. 3.

61. The Diſſeiſee of Land may maintain an Action of Treſpaſs *Quare Clauſum fregit*, for an Injury done to the Land before he was diſſeiſſed.

Bro Treſp. pl. 421.

62. If the Beaſt of *A.* be chaſed into Land, which is the Property of *A.* but in the Poſſeſſion of *B. A.* may maintain an Action of Treſpaſs for the Injury done to his Beaſt: But he cannot maintain an Action of Treſpaſs *Quare Clauſum fregit.*

Cro. Eliz. 143. Hare *v.* Celey. 2 Roll. Abr. 568. N. pl. 2.

63. Although Land in the Poſſeſſion of *J. S.* be ſown by *J. N.* and it be moreover agreed by *J. S.* that *J. N.* ſhall have half the Corn thereupon grown, *J. N.* cannot join with *J. S.* in an Action of Treſpaſs *Quare Clauſum fregit* for an Injury done to the Corn before it is ſevered: Becauſe he is not in the Poſſeſſion of the Land.

(D) For what Injuries to the Perſon an Action of Treſpaſs lies.

1. For a Battery.

1. AN Action of Treſpaſs lies for Battery.

2. But it is not neceſſary in this Place to ſhew what conſtitutes a Battery; becauſe this has been already done under the Title *Aſſault and Battery.*

2. For an accidental Stroke.

Bro. Treſp. pl. 213. pl. 310. Hob. 134. Latch 13, 119.

3. If one Man have received a corporal Injury from the voluntary Act of another, an Action of Treſpaſs lies, provided there was a Neglect or Want of due Caution in the Perſon who did the Injury, although there were no Deſign to injure.

Hob. 134. Weaver *v.* Ward.

4. If a Soldier, for want of due Caution, wound a Man by the Diſcharge of his Gun in exerciſing, this does not amount to a Battery; becauſe there was no Deſign to hurt: But an Action of Treſpaſs lies.

Str. 596. Underwood *v.* Hewſon.

5. The Defendant in uncocking his Gun diſcharged the ſame, and wounded the Plaintiff who was ſtanding by and looking at him; it was holden that an Action of Treſpaſs lay.

1 Ventr. 295. Anon.

6. If a Man ride an unruly Horſe, for the Purpoſe of Breaking it, in a Place much frequented by the King's Subjects, and the Horſe run away with the Rider, and run over a Man and hurt him, an Action of Treſpaſs lies.

7. But if the corporal Injury received is not to be imputed to the Negligence of the Party by whom it was done, or to the want of due Caution, an Action of Treſpaſs does not lie, although it were the Conſequence of a voluntary Act.

Hob. 134. Weaver *v.* Ward.

8. If in the very Inſtant a Soldier diſcharges his Gun in exerciſing a Perſon runs acroſs, and is thereby wounded, an Action of Treſpaſs does not lie.

3. For a falſe Impriſonment.

9. An Action of Treſpaſs lies for every unlawful Reſtraint of Liberty.

10. If a Perſon be unlawfully arreſted in the Street, this, although he be not carried into a Houſe, is a falſe Impriſonment. Finch's Law 202.

11. Every Arreſt of a Man for a civil Cauſe, which is not warranted by legal Proceſs, is an unlawful Reſtraint of Liberty. 2 Inſt. 51, 52.

12. It has been holden, that a Cuſtom to impriſon a Perſon without legal Proceſs is not good. 2 Jon. 147. Elkings v. Newman.

13. If a Perſon be arreſted under a Proceſs which was irregularly iſſued, this is a falſe Impriſonment in the Party at whoſe Suit it was iſſued; for it was incumbent on him, to take Care that the Proceſs was regularly iſſued. 2 Jon. 214. 1 Ventr. 220. Str. 509.

14. But if a Perſon be arreſted under a Proceſs which was erroneouſly iſſued, this is not a falſe Impriſonment; becauſe the irregular iſſuing of the Proceſs was owing to a Miſtake in an Officer of the Court, and not to the Party at whoſe Suit it was iſſued. Str. 509. Philips v. Biron.

15. It ſeems to have been always holden, that it is not a falſe Impriſonment in an Officer, to arreſt a Perſon under the Proceſs of ſuperior Courts, although the Proceſs were irregularly iſſued. Bro. Faux Impr. pl. 31. 1 Ventr. 220. Str. 509.

16. It is laid down by *Hale*, Ch. J. that an Arreſt of a Perſon under the Proceſs of an inferior Court, by an Officer of the Court, is a falſe Impriſonment, in caſe the Proceſs were irregularly iſſued; it being incumbent upon the Officer, or Miniſter of the Court to take Care that the Proceſs was regularly iſſued. 1 Ventr. 220. Read v. Wilmot.

17. But it is in divers Books laid down, that the Officer is not in this Caſe liable to an Action of Treſpaſs; for that it would be hard to puniſh a Perſon, who has done nothing more than execute the Proceſs of a Court, to which he owed Obedience. Cro. Ja. 3. 2 Leon. 89. 4 Leon. 78. 2 Mod. 196. Str. 509.

18. If a known Bailiff arreſt a Perſon under a Warrant of the Sheriff, he is not obliged to ſhew the Warrant: For all Perſons are bound to take Notice that he is a Bailiff; and it is at his Peril to arreſt a Man without a lawful Warrant. Bro. Faux Impr. pl. 23. 9 Rep. 69.

19. But if a ſpecial Bailiff do not in ſuch Caſe ſhew his Warrant, a Sight thereof being demanded at the Time of arreſting the Arreſt is a falſe Impriſonment. Bro. Faux Impr. pl. 23. 9 Rep. 69.

20. If a known Bailiff, who has two Warrants againſt *J. S.* one of which is legal the other illegal, declare at the Time of arreſting *J. S.* that the Arreſt is by Virtue of the illegal Warrant, this is not a falſe Impriſonment: For the Lawfulneſs of the Arreſt does not depend upon what he declares, but upon the Sufficiency of his Authority to arreſt *J. S.* 12 Mod. 387. Grenvill v. The College of Phyſicians.

21. It is in one Caſe doubted, whether an Arreſt by the Aſſiſtant of a Bailiff, whoſe Name is not in the Warrant, even in the Preſence of the Bailiff be not a falſe Impriſonment. 6 Mod. 211.

22. But if a Warrant be directed to two or more Perſons jointly and ſeverally, an Arreſt by any one of theſe is not a falſe Impriſonment. 1 Inſt. 181.

23. If a Stranger aſſiſt a Bailiff in confining a Perſon, who has been arreſted by the Bailiff, this is not a falſe Impriſonment. Bro. Treſp. pl. 402. 2 Roll Abr. 561. F. pl. 2. Cro. Car. 446.

24. If a Stranger, after a Man has been arreſted, confine him at the Requeſt of the Bailiff who arreſted him, this is not a falſe Impriſonment. 2 Roll. Abr. 561. F. pl. 2. Cro. Car. 446.

25. It was formerly holden, that if a Perſon be arreſted under the Proceſs of an inferior Court, for a Cauſe of Action which did not ariſe within the Juriſdiction of the Court, it is a falſe Impriſonment in the Officer who made the Arreſt, and in the Party at whoſe Suit it was made. 10 Rep. 70. The Caſe of the Marſhalſea, Mich. 10 Ja.

26. A Diſtinction was afterwards taken between the Party, at whoſe Suit the Arreſt was in ſuch Caſe made, and the Officer who made it.

2 Mod. 197. Higgenſon v Martin, Hil. 28 Car. 2. 2 Jon. 214. Olliet v. Beſey, Trin. 34 Car. 2.

27. It was holden to be a falſe Impriſonment in the former: Becauſe it ſhall be intended, that he knew where the Cauſe of Action did ariſe; and it was a Fault in him, to ſue in a Court which had not Juriſdiction in the Matter.

2 Mod. 196. Higgenſon v. Martin, Hil. 28 Car. 2.

28. But it was holden not to be a falſe Impriſonment in the Officer, unleſs it appeared plainly, that the Cauſe of Action did not ariſe within the Juriſdiction of the Court: For that, unleſs this did appear plainly, it was the Duty of the Officer to execute the Proceſs.

Ld. Raym. 230. Truſcott v. Carpenter, Trin. 9 W. 3.

29. This Diſtinction ſeems to be at this Day exploded; for it has been holden in another Caſe, in which all the Caſes ſeem to have been well conſidered, that the Party, at whoſe Suit *J. S.* has been arreſted under the Proceſs of an inferior Court, is not liable to an Action of Treſpaſs, although the Cauſe of Action did not ariſe within the Juriſdiction of the Court; for that *J. S.* can only take Advantage thereof by pleading to the Juriſdiction of the Court.

1 Jon. 375. Girling's Caſe.

30. If a Sheriff, to whom no Writ was directed for the arreſting of *A.* make out a Warrant to a Bailiff to arreſt *A.* and *A* be thereupon arreſted, it is a falſe Impriſonment in the Sheriff, and in the Bailiff; becauſe there was no Authority for the Arreſt.

3 Lev. 93. Oſborn v. Brookhouſe. 2 Lev. 19.

31. But if a Writ were directed to a Sheriff for the arreſting of *A.* and he make out a Warrant to a Bailiff, under which *A.* is arreſted before the Writ is delivered to the Sheriff, this is no falſe Impriſonment: For the Writ is an Authority for all that has been done, notwithſtanding it was not delivered to the Sheriff before the Arreſt.

32. Although however the Arreſt upon ſuch Warrant be good, the granting thereof by a Sheriff, or his Deputy, is unlawful: For by the 6 *Geo.* 1. *cap.* 21. *par.* 53. it is enacted, "That if any High Sheriff, Under-Sheriff, "or his or their Deputy, ſhall make, or cauſe to be made or delivered out, "to any Perſon whomſoever, any Warrant, before they or ſome one of "them ſhall actually have in their Cuſtody the Writ upon which ſuch War"rant ought to iſſue; that then the Perſon or Perſons ſo offending, and "every of them, ſhall forfeit ten Pounds for every ſuch Offence."

Bro. Office, pl. 8. 2 Roll. Abr. 552. O. pl. 5. 1 Bulſtr. 149.

33. If *A.* be arreſted inſtead of *B.* whom the Sheriff had a Writ to arreſt, this, although *B.* be very much like *A.* in the Face, is a falſe Impriſonment; for the Sheriff is at his Peril to take Care, that he do not arreſt any other Perſon than him againſt whom the Writ iſſued.

Moor 457. Coote v. Lightworth. Hardr. 323.

34. Nay it has been holden, that if *A.* tell an Officer, who has a Warrant to arreſt *B.* that his Name is *B.* and thereupon the Officer arreſt *A.* this is a falſe Impriſonment; for that the Officer is at his Peril to take Care, that he do not arreſt any other Perſon than him againſt whom the Writ iſſued.

35. It is by the 29 *Car.* 2. *cap.* 7. *par.* 6. enacted, "That the Perſon "ſerving or executing any Writ, Proceſs, Warrant, Order, Judgment or "Decree, upon the Lord's Day, except in Caſes of Treaſon, Felony or "Breach of the Peace, ſhall be as liable to the Suit of the Party grieved, "and to anſwer Damages for the doing thereof, as if he had done the ſame "without any Writ, Proceſs, Warrant, Order, Judgment or Decree."

Sheph. 1028.

36. It is ſaid, that the Arreſting of a Clergyman under a Civil Proceſs, either in going to Church to perform Divine Service, or in returning from thence, on any Day, is a falſe Impriſonment.

6 Mod. 154. Rich v. Doughty.

37. If a Perſon, againſt whom an eſcape Warrant has iſſued, were arreſted by the Mob, and by them delivered to the Sheriff, and the Sheriff detain him, this is a falſe Impriſonment; for, as he was not arreſted by a proper Officer, the Arreſt was illegal; and if ſo, the ſubſequent Detention is illegal.

38. But

38. But if a Perſon, who was arreſted by the Bailiff of a Liberty out of the Liberty, were delivered by the Bailiff into the Cuſtody of the Gaoler of the Liberty, it is not a falſe Impriſonment in the Gaoler to detain him, although an Action of Treſpaſs would lie againſt the Bailiff for the illegal Arreſt: For, inaſmuch as the Gaoler would have been liable to an Action of Eſcape, if he had refuſed to receive the arreſted Perſon, or if he had afterwards ſuffered him to go at large, it would be very unreaſonable, that he ſhould be liable to an Action of Treſpaſs for detaining him. Skin. 50. Elliot v. Beſey. 2 Jon. 214.

39. An unlawful Detention of a Perſon who has been arreſted does, although the firſt Arreſt were lawful, amount to a new Arreſt, and conſequently it is a falſe Impriſonment. Cro. Car. 379. Wythers v. Henley.

40. If a Plaintiff do, by an Order in Writing, direct a Sheriff to diſcharge a Perſon, whom he has arreſted under a *Capias* or an *Exigent* at the Suit of the Plaintiff, and the Sheriff afterwards detain the Perſon, this is a falſe Impriſonment. 3 Bulſtr. 97, 98 Wythers v. Henley. Cro. Car. 379.

41. If a Sheriff detain a Man, whom he has arreſted under a *Capias* or an *Exigent*, after a Writ of *Superſedeas* has been delivered to him, this is a falſe Impriſonment. Fitz. N. B. 236. Cro. Ja. 379. 1 Roll. Rep. 141. 3 Bulſtr. 97.

42. But the detaining of a Man, who has been arreſted under a *Capias ad Satisfaciendum*, after a Writ of *Superſedeas* has been delivered to the Sheriff, is not a falſe Impriſonment: Becauſe a Writ of *Superſedeas* does not lie after a Perſon is taken in Execution. Fitz. N. B. 237. 1 Ventr. 2. Jenk. 92. pl. 80.

43. It is not a falſe Impriſonment, either in a Sheriff or Gaoler, to detain a Man who ought otherwiſe to be diſcharged, until he pay the Fees due to the Sheriff or Gaoler. 2 Inſt. 53.

44. If the Order of a Court be to confine a Perſon in a certain Priſon, the confining of him in any other Priſon is a falſe Impriſonment. Salk. 408. Swinſtead v. Lyddal. Skin. 664.

45. An Officer, who has arreſted a Man under a *Capias*, may confine him wherever he pleaſes: For the Words of this Writ are, *Ita quod habeas Corpus ejus coram, &c.* Salk. 408. Swinſtead v. Lyddal. Skin. 664.

46. It is in the general true, that an Arreſt for a criminal Cauſe, without an expreſs Warrant, is a falſe Impriſonment. 2 Inſt. 51, 52.

47. And wherever an expreſs Warrant is neceſſary to authoriſe an Arreſt for a criminal Cauſe, an Arreſt without an expreſs Warrant can never be juſtified under one granted after the Arreſt. Bro. Faux Impr. pl. 8. 2 Hawk. P. C. 81.

48. But in ſome Caſes an Arreſt may be made for a criminal Cauſe without an expreſs Warrant.

49. If a Felony have been committed, and *A.* have juſt Cauſe to ſuſpect it was committed by *B.* *A.* may arreſt *B.* without an expreſs Warrant. Bro. Faux Impr. pl. 1. 1 Bulſtr. 150. 2 Hawk. P. C. 82.

50. But if *A.* arreſt *B.* without an expreſs Warrant, becauſe *C.* has juſt Cauſe to ſuſpect that *B.* has committed a Felony, *A.* is guilty of a falſe Impriſonment; for the Power of arreſting without an expreſs Warrant is confined to the Party ſuſpecting. Bro. Faux Impr. pl. 8. 1 Bulſtr. 151. 2 Inſt. 52. 2 Hawk. P. C. 82.

51. A private Perſon may without an expreſs Warrant arreſt Perſons who are actually fighting; and keep them in Cuſtody until their Paſſion is over. 1 Inſt. 52. Bro. Faux Impr pl. 6. 1 Hawk. P. C. 136. 2 Hawk. P. C. 81.

52. And it is ſaid, that the arreſting of a Perſon, who is coming to the Aſſiſtance of one who is fighting, is not a falſe Impriſonment. 1 Hawk. P. C. 136.

53. It

2 Inſt. 52. Bro. Faux Impr. pl. 6. 2 Hawk. P. C. 81.

53. It is in the general true, that an Arreſt cannot be made, either by a Peace-Officer or a private Perſon, on the Account of an Affray, after the Affray is over, without an expreſs Warrant.

2 Inſt. 52. Bro. Faux Impr. pl. 6. pl. 44. 1 Hawk. P. C. 136. 2 Hawk. P. C. 81.

54. But if a Man have received a dangerous Wound in an Affray, the Party who gave the Wound may be arreſted after the Affray is over, either by a Peace-Officer or a private Perſon, without an expreſs Warrant; and may be confined, until a Judgment can be formed, whether it be probable, that the Wound will prove mortal.

2 H.H. P.C. 77.

55. A private Perſon may without an expreſs Warrant arreſt a Perſon, whom he ſees upon the Point of committing Treaſon or Felony, or of doing an Act which may endanger the Life of any Perſon; and may confine him, until it may be reaſonably ſuppoſed, that he has laid aſide the Deſign of committing the Treaſon or Felony, or doing the Act.

Bro. Faux Impr. pl. 41.

56. A Peace Officer may without an expreſs Warrant arreſt a Perſon, who has aſſaulted him.

Bro. Faux Impr. pl. 28. pl. 25.

57. A private Perſon may without an expreſs Warrant confine a Perſon diſordered in his Mind, who ſeems diſpoſed to do Miſchief to himſelf, or to any other Perſon.

2 Inſt. 52. Bro. Treſp. pl. 416.

58. It is laid down, that a private Perſon may without an expreſs Warrant arreſt a Night-Walker; for that the doing of this is for the good of the Publick.

Ld. Raym. 1301. Tooley's Caſe.

59. But it was holden in a modern Caſe, that no Perſon, not even a Conſtable, can arreſt a Night-Walker, unleſs the Night-Walker have been guilty of ſome diſorderly Act.

Bro. Faux Impr. pl. 6. pl. 16. 1 Roll. Abr. 559. D. pl. 1. pl. 2.

60. A Peace Officer may without an expreſs Warrant arreſt a Perſon, againſt whom a Hue and Cry has been levied.

2 Inſt. 52. Bro. Treſp. pl. 213.

61. And it is laid down in ſome Books, without confining the Power of arreſting to a Peace Officer, that the Perſon, againſt whom a Hue and Cry has been levied, may be arreſted without an expreſs Warrant.

62. It is in the general true, that an expreſs Warrant for the arreſting of a Perſon ought to be in Writing.

2 Roll. Abr. 558. C. pl. 2.

63. But an Arreſt under a Parol Warrant of the Court of King's Bench is not a falſe Impriſonment.

Moor 408. Broughton *v.* Mulſhoe.

64. It is laid down in one Caſe, that the confining of a Man for a ſhort Space of Time, under the Parol Warrant of a Juſtice of the Peace, for further Examination is not a falſe Impriſonment.

Cro. Eliz. 819. Savage *v.* Tatcham

65. But it is in another Caſe laid down, that a Confinement for further Examination, under Parol Warrant of a Juſtice of the Peace, ought not to exceed three Days.

Moor 408. Broughton *v.* Mulſhoe. 2 Hawk. P. C. 83.

66. It it lawful for a Juſtice of the Peace to authoriſe any Perſon, by Parol Warrant, to arreſt a Perſon, who has been guilty of a Breach of the Peace in his Preſence.

Cro. Ja 82. Boucher's Caſe.

67. A Commitment under the Warrant of a Juſtice of the Peace, which does not mention the Crime for which the Perſon is committed, is a falſe Impriſonment.

68. But

68. But a Juſtice of the Peace may grant a Warrant to arreſt a Man for further Examination, without mentioning the Crime of which he is accuſed; for it may not always be proper to let even the Peace-Officer know the Crime, of which the Party to be arreſted is accuſed. Cro. Ja. 81. 2 Hawk. P. C. 81.

69. If a Perſon be arreſted under the Warrant of a Juſtice of the Peace, for a Matter of which the Juſtice had not Juriſdiction, it is a falſe Impriſonment in the Juſtice. 2 Hawk. P. C. 83.

70. If a ſworn Peace Officer arreſt a Perſon under the Warrant of a Juſtice of the Peace in the Precinct of which he is an Officer, it is not neceſſary to ſhew the Warrant. 2 Hawk. P. C. 86.

71. But if a Perſon be arreſted under ſuch Warrant by a Perſon who is not a ſworn Peace-Officer, or by a ſworn Peace-Officer out of his Precinct, and the Warrant be not, upon a Demand thereof at the Time of arreſting, ſhewn, it is a falſe Impriſonment. Ibid.

72. If a Peace-Officer, after having arreſted a Man under a Warrant of a Juſtice of the Peace, ſuffer him to go at large, and afterwards retake him under the ſame Warrant, it is a falſe Impriſonment. 2 Hawk. P. C. 81.

73. The Point is not quite ſettled: But it ſeems to be the better Opinion, that, although a Peace-Officer cannot retake a Perſon, whom he had before arreſted under a Warrant of a Juſtice of the Peace and ſuffered to go at large, under the ſame Warrant, if the Perſon voluntarily ſurrender himſelf, it is lawful for the Peace-Officer to detain him, and carry him before a Juſtice of Peace. Ibid.

74. Heretofore, if a Peace-Officer had arreſted a Perſon under the Warrant of a Juſtice of Peace, for an Offence of which it appeared upon the Face of the Warrant that the Juſtice had not Juriſdiction, it would have been a falſe Impriſonment. Ibid.

75. But by the 24 *Geo.* 2. *cap.* 44. *par.* 6. it is enacted, "That no Action ſhall be brought againſt any Conſtable or other Officer, or againſt "any Perſon acting by his Order and in his Aid, for any Thing done in "Obedience to any Warrant under the Hand or Seal of any Juſtice of the "Peace, until Demand hath been made or left at his uſual Place of Abode "in Writing, ſigned by the Party intending to bring ſuch Action, of the "Peruſal and Copy of ſuch Warrant, and the ſame hath been refuſed or "neglected for the Space of ſix Days after ſuch Demand."

(E) For what Injuries to Perſonal Property an Action of Treſpaſs lies.

1. To live Property.

1. IT has been holden, that no Perſon can have ſuch Property in a Negro in *England*, as will enable him to recover the Value of the Negro in an Action of Treſpaſs, in Caſe he be taken away; and that the Maſter of the Negro can only recover, as he may in the Caſe of another Servant, Damages for the Loſs of Service. Ld. Raym. 146. Chamberlain v. Harvey, Hil. 8 W. 3.

2. It appears from another Report of this Caſe, that one Queſtion was, whether the Baptiſm of the Negro, after taking him from his Maſter, did not amount to an Emancipation: But the Court determined the Caſe upon the general Queſtion, without giving an Opinion as to this Queſtion. Carth. 397.

3. In

Ld. Raym. 1274. Smith v. Gould, Paſch. 5 Ann.

3. In a ſtill later Caſe it was holden, that no Perſon can have ſuch a Property in a Negro in *England*, as will enable him to maintain an Action of Trover for the Converſion of the Negro; and in this Caſe the Authority of the Caſe of *Butts* v. *Penny*, 2 *Lev.* 20. in which it had been holden that an Action of Trover will lie in ſuch Caſe, was denied.

Bro. Treſp. pl. 213.

4. If the Sheep of *J. N.* are mixed with the Sheep of *J. S.* and *J. S.* chaſe them to the next convenient Place for that Purpoſe, in order to ſeparate his Sheep from the Sheep of *J. N.* an Action of Treſpaſs does not lie; for as they could not have been eaſily ſeparated without it, the Chaſing was lawful.

4 Rep. 38. Tirringham's Caſe. 2 Roll. Abr. 566. J. pl. 15. 1 Jon. 131.

5. If *J. S.* chaſe the Beaſt of *J. N.* with a little Dog out of Land in the Poſſeſſion of *J. S.* an Action of Treſpaſs does not lie; inaſmuch as *J. S.* has an Election to do this, or to diſtrain the Beaſt.

1 Freem. 347. King v. Roſe. 4 Rep. 38. Cro. Car. 254.

6. But if *J. S.* chaſe the Beaſt of *J. N* with a Maſtiff Dog out of Land in the Poſſeſſion of *J. S.* and any Hurt be thereby done to the Beaſt, this Action does lie; the Chaſing with ſuch a Dog being unlawful.

Bro. Treſp. pl. 421. Kelw. 46.

7. If a Stranger chaſe the Beaſt of *J. N.* out of Land in the Poſſeſſion of *J. S.* Action of Treſpaſs lies.

Dyer 25. pl. 162.

8. If the Dog of *J. S.* kill a Sheep the Property of *J. N.* an Action of Treſpaſs does not lie, unleſs *J. S.* knew the Dog had been accuſtomed to bite Sheep.

12 Mod 332. Maſon v. Reding. Ld. Raym. 608. S. C.

9. If the Owner of a very fierce Dog ſuffer him to go about the Streets unmuzzled, and the Dog bite a Man, an Action of Treſpaſs does not lie, unleſs the Owner knew the Dog to be very fierce.

Fitz. N. B. 86. Bro. Treſp. pl. 407. Hob. 283.

10. An Action of Treſpaſs lies for Taking or Killing a Dog: Becauſe, as a Dog is a tame Animal, there may as well be a Property therein as in any other Animal.

Cro. Eliz. 125. Cro. Ja. 463.

1 Freem. 347. King v. Roſe.

11. But if while *J. S.* is chaſing the Beaſt of *J. N.* with a Maſtiff Dog, in order to drive it out of Land in the Poſſeſſion of *J. S* *J. N.* to prevent Miſchief to his Beaſt, kill the Dog, this Action does not lie.

Cro. Ja. 45. Sid. 336.

12. This Action does not lie for Killing a Dog found in a Warren: Becauſe, ſuch a Dog is to be conſidered as a Species of Vermin.

3 Lev. 28. Barrington v. Turner.

13. And it has been holden, that this Action does not lie, for killing a Dog found in a Park, although the Dog might have been taken alive.

14. An Action of Treſpaſs does not in the general lie for the Taking or Killing of a Beaſt or Bird, which is *Feræ Naturæ*: Becauſe there is no Property in either of theſe.

Bro. Detin. pl. 44. Bro. Treſp. pl. 407.

15. But if a Beaſt or Bird which is *Feræ Naturæ* have been reclaimed, this Action lies for the Taking or Killing thereof; becauſe there is a Property in the Beaſt or Bird.

16. And an Action of Treſpaſs does in ſome Caſes lie for Taking or Killing a Beaſt or Bird; although the Beaſt or Bird be *Feræ Naturæ*, and have not been reclaimed

Fitz. N. B. 87. Godb. 123. Salk. 556. 11 Mod. 75.

17. If a Hare or Coney be taken or killed upon the Land of *J. S.* this Action lies, although the Land be not a Warren, or the Hare or Coney have not been reclaimed; for *J. S.* has, by Reaſon of its being upon his Land, a local Property in the Hare or Coney.

18. But

18. But if a Hare or Coney be driven off the Land of *J. S.* and killed by *J. N.* *J. S.* cannot in the general maintain this Action: Becauſe the Property, which was only a local one, is determined by driving the Hare or Coney off the Land. 5 Rep. 104. Boulſton's Caſe. Cro. Car. 554.

19. If however *J. S.* do immediately purſue the Hare or Coney, which has been driven off his Land and killed by *J. N.* it is not lawful for *J. N.* to carry it away: For by the immediate Purſuit of *J. S.* the local Property is continued. Godb. 123. Salk. 556. 11 Mod. 75.

20. If the Beaſt of *J. S.* have been unlawfully taken by *J. N.* an Action of Treſpaſs does not lie for the Retaking thereof by *J. S.* Becauſe *J. N.* was himſelf the firſt Wrong-Doer. Bro. Treſp. pl. 323. Cro. Eliz. 329.

21. And for the ſame Reaſon, if the Mare of *J. S.* which was unlawfully taken by *J. N.* do afterwards drop a Foal, an Action of Treſpaſs does not lie againſt *J. S.* for the Retaking of the Mare, and the Taking of the Foal. Bro. Treſp. pl. 323.

22. If the Beaſt of *J. S.* have been ſeiſed for the Uſe of the King, and *J. S.* even before Office found retake it, an Action of Treſpaſs lies; for by the Seizure his Property was deveſted. Bro. Treſp. pl. 357.

23. An Action of Treſpaſs lies for the Taking of a Beaſt, although it be afterwards retaken by, or reſtored to, the Owner: For the Retaking or Reſtoring does in ſuch Caſe only go in Mitigation of Damages. Bro. Treſp. pl. 221. 2 Roll. Abr. 569. pl. 3. pl. 6.

2. To dead Property.

24. If a Ship have been wrecked, and the Goods of *J. S.* which were in the Ship, are taken up by *J. N.* *J. S.* cannot maintain an Action of Treſpaſs: Becauſe *J. N.* did not obtain the Poſſeſſion of the Goods tortiouſly, but by the Act of God. Bro. Treſp. pl. 54. 2 Roll. Abr. 555. pl. 6.

25. If the Goods of *J. S.* which have been illegally taken in Execution by a Sheriff, are by the Sheriff delivered to *J. N.* this Action does not lie: Becauſe the Poſſeſſion of the Goods by *J. N.* was lawfully obtained. Bro. Treſp. pl. 48.

26. If *J. S.* in whom the general Property in Goods is, give or ſell them to *J. N.* but do not deliver them, and *J. N.* take them, an Action of Treſpaſs does not lie: Becauſe, as *J. N.* did by the Gift or Sale acquire a Property in the Goods, he had a Right to the Poſſeſſion of them. Bro. Treſp. pl. 124. pl. 303. Latch 213.

27. But if an Infant, in whom the general Property in Goods is, give or ſell them to *J. N.* but do not deliver them, and *J. N.* take them, this Action does not lie: Becauſe, as the general Property of the Infant was not diveſted by the Gift or Sale, the Poſſeſſion of the Goods was tortiouſly obtained by *J. N.* Bro. Treſp. pl. 150.

28. If however an Infant, in whom the general Property in Goods is, give or ſell them, and do alſo deliver them to *J. N.* this Action does not lie: Becauſe, although the general Property of the Infant was not diveſted by the Gift or Sale and Delivery, the Poſſeſſion of the Goods by *J. N.* was obtained lawfully. Ibid.

29. If the Bailee of Goods give or ſell them to *J. N.* but do not deliver them, and *J. N.* take them, an Action of Treſpaſs lies: Becauſe, as the Gift or Sale of a Perſon who had only a ſpecial Property in the Goods did not transfer a Property to *J. N.* his Poſſeſſion of the Goods was tortiouſly obtained. Bro. Treſp. pl. 216.

30. If a Servant, who is impowered to ſell the Goods of his Maſter, give them to *J. N.* and deliver them, and *J. N.* carry them away, an Action of Treſpaſs does not lie: Becauſe, as a Power to ſell Goods does imply a Power to transfer a Property in them, the Poſſeſſion of the Goods by *J. N.* was lawfully obtained. Bro Treſp. pl. 295.

31 But

Bro. Treſp. pl. 295.

31. But if a Servant, who has only the Cuſtody of his Maſter's Goods, give or ſell them to *J. N.* and deliver them, and *J. N.* carry them away, this Action lies: Becauſe, as the Servant had no Power to transfer a Property in the Goods, the Poſſeſſion of the Goods by *J. N.* was tortiouſly obtained.

Bro. Bar. and Feme, pl. 36. Bro. Treſp. pl. 92.

32. It ſeems to be the better Opinion, that if the Goods of *J. S.* are given or ſold, and delivered by his Wife to *J. N.* and *J. N.* carry them away, an Action of Treſpaſs does not lie: Becauſe, as a Wife has a Power over the Goods of her Huſband, the Poſſeſſion of *J. N.* was lawfully obtained.

Stra. 820. Legliſe *v.* Champante.

33. If Goods have been ſeized illegally by an Officer of the Cuſtoms, an Action of Treſpaſs lies; notwithſtanding there was a probable Cauſe of Seizure; for the Officer acted at his Peril.

Bro. Treſp. pl. 364. 2 Roll. Abr. 552. O. pl. 3. pl. 9. Carth. 381.

34. If the Goods of *J. N.* are taken by a Sheriff, who has a Writ to levy of the Goods of *J. S.* an Action of Treſpaſs lies; for the Sheriff is at his Peril to take Care, that he do not levy the Goods of any other Perſon than *J. S.*

Bro. Treſp. pl. 213.

35. If *J. S.* take the Goods of *J. N.* to prevent their being ſtolen or ſpoiled, an Action of Treſpaſs lies: Becauſe the Loſs to *J. N.* would not, if either of theſe Things had happened, have been irremediable.

Ibid.

36. But if the Goods of *J. N.* are in Danger of being deſtroyed by Fire, and *J. S.* in order to prevent this take them, this Action does not lie: Becauſe the Loſs, if this had happened, would have been irremediable.

Bro. Treſp. pl. 415.

37. It is ſaid in one Book, that an Action of Treſpaſs does not lie for the Taking of Goods, after the Perſon who took them has been indicted of Felony and acquitted; for that, as *omne Majus trahit ad ſe Minus*, the Treſpaſs is extinguiſhed in the Felony.

1 Jon. 150. Markham *v.* Cobb. Latch 144. Noy 82. Sty. 346.

38. But it is in other Books laid down, that if *J. S.* who has been indicted for felonioufly taking the Goods of *J. N.* have been acquitted, *J. N.* may maintain this Action: Becauſe, as it does not in this Caſe appear from the Record that the Taking was felonious, it ſeems highly reaſonable, that *J. N.* ſhould recover the Value of his Goods.

1 Jon 148, 150. Markham *v.* Cobb. Latch 144. S. C.

39. An Action of Treſpaſs does not lie for the Taking of Goods, for which an Appeal of Robbery has been brought; for a Perſon, who has by bringing the Appeal affirmed the Taking to have been felonious, ſhall not afterwards be received to ſay that it was only a Treſpaſs.

1 Jon. 147, 150. Markham *v.* Cobb. Paſch. 1 Car. Latch 144. S. C. Noy 82. S. C.

40. It has been in one Caſe holden, that if *J. S.* have been convicted or attainted of felonioufly taking the Goods of *J. N.* *J. N.* cannot, provided he did himſelf give Evidence, or did procure any Perſon to give Evidence againſt *J. S.* maintain an Action of Treſpaſs: Becauſe he is in either Caſe intitled under the 21 *H.* 8. *cap.* 11. to a Reſtitution of the Goods.

2 Roll. Abr. 557. Y. pl. 24. Dawkes *v.* Cavenagh, Mich 1652.

41. It is laid down in a ſubſequent Caſe, that an Action of Treſpaſs does lie in ſuch Caſe: For that, as the Party robbed has done his Duty to the Publick in proſecuting the Thief, it is reaſonable he ſhould have a Remedy for the Injury to himſelf.

1 Jon. 147. Markham *v.* Cobb. Latch 144. S. C. Noy 82. S. C.

42. It appears from the Report of the former Caſe, that the three Juſtices were divided in Opinion, whether an Action of Treſpaſs does lie, where *J. S.* who took the Goods of *J. N.* has been convicted or attainted of taking them felonioufly; although no Evidence were given againſt *J. S.* by *J. N.* or by any Perſon procured by him.

43. *Doddridge* J. and *Whitelock* J. were of Opinion, that where the Party robbed has been a Party to the Proſecution, he is a Party to the Record

cord of Conviction or Attainder, by which the Taking of the Goods appears to have been felonious; and conſequently he ſhall not be afterwards received to ſay, that the Offence was only a Treſpaſs: But that, where the Party robbed has not been a Party to the Proſecution, he may maintain an Action of Treſpaſs; and the rather, becauſe he would otherwiſe be without Remedy; for the 21 *H.* 8. *cap.* 11. only gives Reſtitution of the Goods, "where *the Felon is convicted, or otherways attainted, by Reaſon of the "Evidence given by the Party robbed, or by any other by his Procurement.*"

44. But *Jones* J. was of Opinion, that this Action does not lie in either Caſe. He admitted, that, if the Party robbed bring an Action of Treſpaſs before the Conviction or Attainder of the Perſon who took them, the latter cannot plead, that he took the Goods *Animo furandi*; for that he ſhall not be ſuffered to defeat the Action by ſuch an Explanation of his Intention: But that, if it appear from a Record, that the Taking of the Goods was felonious, this may be pleaded in Bar of the Action of Treſpaſs.

45. If *J. S.* extort Money from *J. N.* an Action of Treſpaſs lies; every Act of Extortion being a Treſpaſs. 11 Mod. 137. Woodward's Caſe.

46. If the Obligor take away a Bond from the Obligee, an Action of Treſpaſs lies. 2 Roll. Abr. 557. D. pl. 1

47. An Action of Treſpaſs lies againſt a Rector or Vicar for taking a Coat of Arms or a Grave-Stone out of his Church; for neither of theſe is to be conſidered as an Oblation. Bro. Treſp. pl. 181.

48. If *J. S.* who has a Deed belonging to *J. N.* in his Power, tear off the Seal, an Action of Treſpaſs lies. Bro. Treſp. pl. 29.

49. If a Miller take Toll of Corn, whereof none ought to be taken, an Action of Treſpaſs lies. Bro. Treſp. pl. 47.

50. If *J. S.* draw Wine out of the Veſſel of *J. N.* and afterwards fill up the Veſſel with Water, an Action of Treſpaſs lies: For by ſo doing the Reſidue of the Wine is damaged. Fitz. N. B. 88.

51. The Owner of a ſeveral Fiſhery may diſtrain Nets found in his Water, as being Damage-feaſant: But if he cut them, an Action of Treſpaſs lies. Cro. Car. 228. Raynal *v.* Champernoon.

52. If the Maſter of a Ship, in order to prevent her ſinking, throw Goods overboard, an Action of Treſpaſs does not lie: The doing of this being neceſſary for preſerving the Lives of the Perſons on Board. 2 Roll. Abr. 567. K. pl. 2.

53. If the Goods of *J. S.* which have been taken unlawfully by *J. N.* are taken by *J. S.* an Action of Treſpaſs does not lie: Becauſe *J. N.* was himſelf the firſt Wrong-doer. Bro. Treſp. pl. 323. Cro. Eliz. 329.

54. If Leather which was unlawfully taken from *J. S.* be made into Shoes, an Action of Treſpaſs does not lie againſt *J. S.* for taking the Shoes. Bro. Treſp. pl. 23.

55. If a Piece of Timber which was illegally taken from *J. S.* have been hewed, this Action does not lie againſt *J. S.* for retaking it. Ibid.

56. But if a Piece of Timber, which was illegally taken, have been uſed in Building or Repairing, this, although it is known to be the Piece which was taken, cannot be retaken; the Nature of the Timber being changed: For by annexing it to the Freehold it is become real Property. Ibid.

57. If the Money of *J. S.* which is not to be diſtinguiſhed from the Money of *J. N.* have been illegally taken by *J. N.* it is not lawful for *J. S.* to take any Money from *J. N.* becauſe he cannot be certain that he takes his own Money. Ibid.

58. If *J. S.* mix an unknown Quantity of his Corn or Money with an unknown Quantity of the Corn or Money of *J. N.* and *J. N.* take the Whole, an Action of Treſpaſs does not lie: Becauſe it cannot be known how much thereof Cro. Ja. 366. Ward *v.* Ayre. 2 Bulſt. 323.

thereof is the Property of *J. S.* and as the Intermixing muſt have proceeded from a Deſign of getting ſome of the Corn or Money of *J. N.* or from the Folly of *J. S.* it is very reaſonable, that *J. S.* ſhould in either Caſe be puniſhed with the Loſs of his own Corn or Money.

59. An Action of Treſpaſs did heretofore lie, for diſtraining Goods for Money due for the Relief of the Poor, in Caſe there were a Defect in the Authority, under which the Diſtreſs was taken.

60. But it is by 17 *Geo.* 2. *cap.* 38. *par.* 8. enacted, "That, where any "Diſtreſs ſhall be made by an Overſeer for Money juſtly due for the Relief "of the Poor, the Diſtreſs ſhall not be deemed unlawful, nor the Party "making it a Treſpaſſer, on Account of any Defect, or Want of Form, "in the Warrant of Appointment of ſuch Overſeer; or in the Rate or Aſ-"ſeſſment; or in the Warrant of Diſtreſs thereupon."

Bro. Treſp. pl. 221. 2 Roll. Abr. 569. pl. 3. pl. 6.

61. An Action of Treſpaſs lies for the Taking of Goods, although they are afterwards retaken by, or reſtored to, the Owner: For the retaking or reſtoring does only go in Mitigation of Damages.

(F) For what Injuries to Real Property an Action of Treſpaſs lies.

1. To Land.

37 H. 6, 37. pl. 26.

1. IF a Man, who is aſſaulted and in Danger of his Life, run through the Cloſe of another without keeping in a Footpath, an Action of Treſpaſs does not lie: Becauſe the doing of this, it being neceſſary for the Preſervation of his Life, is lawful.

Bro. Treſp. pl. 213.

2. If *J. S.* go into the Cloſe of *J. N.* to ſuccour the Beaſt of *J. N.* the Life of which is in Danger, an Action of Treſpaſs does not lie: Becauſe, as the Loſs to *J. N.* if the Beaſt had died would have been irremediable, the doing of this is lawful.

Ibid.

3. But if *J. S.* go into the Cloſe of *J. N.* to prevent the Beaſt of *J. N.* from being ſtolen, or to prevent his Corn from being conſumed by Hogs or ſpoiled, this Action does lie; for the Loſs, if either of theſe Things had happened, would not have been irremediable.

Ibid.

4. If a Tree the Property of *J. S.* be blown down, and it fall upon the Land of *J. N.* and *J. S.* go upon the Land to take it away, an Action of Treſpaſs does not lie.

Ibid.

5. But if the Loppings of a Tree belonging to *J. S.* fall upon the Land of *J. N.* and *J. S.* go upon the Land to take them away, this Action does lie, provided the Falling of them there might by uſing proper Caution have been prevented.

Latch 120. Millen *v.* Fawdry.

6. If the Fruit of a Tree belonging to *J. S.* fall upon the Land of *J. N.* and *J. S.* go upon the Land to take it away, an Action of Treſpaſs does not lie: Becauſe the Falling of this there could not be prevented.

2 Roll Abr. 565. Toplady *v.* Sealey.

7. If *J. S.* walk without keeping in a Footpath in the Cloſe of *J. N.* to look for a Beaſt which he has loſt, an Action of Treſpaſs lies.

2 Rol. Rep. 55.

8. But if the Beaſt of *J. S.* which has been ſtolen, be put into the Cloſe of *J. N.* and *J. S.* go thereinto to take it away, this Action does not lie.

9. If

9. If *J. S.* have driven the Beaſt of *J. N.* into the Cloſe of *J. S.* or if it have been driven thereinto by a Stranger with the Conſent of *J. S.* and *J. N.* go thereinto to take it away, this Action does not lie; becauſe *J. S.* was himſelf the firſt Wrong-doer. 2 Roll. Abr. 566. I. pl. 9. Cro. Eliz. 329.

10. If *J. S.* chaſe the Beaſt of *J. N.* which is Damage-feaſant in the Cloſe of *J. S.* into the Ground of *J. N.* an Action of Treſpaſs does not lie; becauſe *J. S.* had a Right to do this. Latch 120. Millen *v.* Fawdry.

11. But if a Stranger chaſe the Beaſt of *J. N.* which is Damage-feaſant therein, out of the Cloſe of *J. S.* this Action does lie: For by doing this, although it ſeem to be for his Benefit, *J. S.* is deprived of his Right to diſtrain the Beaſt. Bro. Treſp. pl. 421. Kelw. 46. B.

12. If *A.* chaſe the Beaſt of *B.* which is Damage-feaſant therein, with a little Dog out of the Cloſe of *A.* and the Dog, notwithſtanding the Endeavour of *A.* to call it off, afterwards chaſe the Beaſt into the Cloſe of *C.* this Action does not lie; for the Chaſing of it out of his Cloſe by *A.* was lawful, and it was not in his Power to prevent its being chaſed into the Cloſe of *C.* Latch 119. Millen *v.* Fawdry. 1 Jon. 131.

13. If a Sheriff, who comes to Replevin the Beaſt of *J. S.* which is impounded in the Cloſe of *J. N.* break down the Fence of the Cloſe and enter that Way, when he might have went through the Gate, an Action of Treſpaſs lies. 2 Roll. Abr. 552. O. pl. 7.

14. But if, by Reaſon of the Threat of *J. N.* the Sheriff fear his Life will be in Danger if he go through the Gate, and in Conſequence of this he break down the Fence of the Cloſe, and enter that Way, this Action does not lie. 2 Roll. Abr. 552. O. pl. 8.

15. If a Beaſt have been diſtrained Damage-feaſant, an Action of Treſpaſs does not lie for the Damage done: For the Poſſeſſor of the Land, after having made his Election to diſtrain, ought not to have another Remedy for the ſame Injury. 12 Mod. 663. Vaſper *v.* Edwards. Salk. 248.

16. As the Beaſt, however, is in ſuch Caſe a mere Pledge, and not a Satisfaction for the Damage done, if it die, or eſcape ſo as to be loſt, without the Default of the Diſtrainer, this Action does lie: Becauſe, as the detaining of the Beaſt was owing to the Default of the Owner, in not making a Satisfaction for the Damage done, he ought to take the Conſequence of its dying or eſcaping. 12 Mod. 663, 664. Vaſper *v.* Edwards. Ld. Raym. 720. Salk. 248.

17. But if the Death or Eſcape of the Beaſt were owing to the Default of the Diſtrainer, he cannot maintain this Action; for it would be very hard, that the Owner ſhould, after loſing his Beaſt by the Default of the Diſtrainer, be liable to make Satisfaction for the Damage done. 12 Mod. 663, 664, 665. Vaſper *v.* Edwards. Ld. Raym. 720. Salk. 248.

18. An Action of Treſpaſs lies for erecting a Stall in a publick Market; for, notwithſtanding every Man has of common Right the Liberty of ſelling in ſuch Market, no Man can erect a Stall on the Soil of another without his Permiſſion. Str. 1239. The Mayor of Northampton *v.* Ward.

19 If a Perſon, who is bound to erect a Building upon the Land of *J. S.* bring a Carpenter, not being one himſelf, upon the Land of *J. S.* to erect the Building, an Action of Treſpaſs does not lie: Becauſe the doing thereof is of Neceſſity. Bro. Treſp. pl. 342.

20. If *J. S.* who is bound to repair a Bridge, cannot do this without coming upon the Land of *J. N.* an Action of Treſpaſs does not lie for his coming thereupon: Becauſe the doing of this is neceſſary. Bro. Treſp. pl. 260.

21. But if *J. S.* have commanded *A.* to deliver a Beaſt to *J. N.* and *J. N.* go into the Cloſe of *J. S.* to receive the Beaſt, this Action does lie; for, as the Beaſt might have been delivered at the Gate of the Cloſe, the going of *J. N.* thereinto is not neceſſary. Bro. Treſp. pl. 342.

2 Roll. Abr. 567. M.pl.1. 22. If *J. S.* have ſold Trees growing upon his Land to *J. N.* and *J. N.* go upon the Land to cut and take them away, an Action of Treſpaſs does not lie; the Right of doing this being incident to the Purchaſe.

Bro. Treſp. pl. 400. 23. And for the ſame Reaſon, if the Land, on which Trees growing are ſold, be afterwards ſold, and the Vendee go upon the Land to cut and take them away, this Action does not lie.

2 Roll. Abr. 564. H.pl.1. pl. 2. 1 Brownl. 224. 24. If a Man, who was ſeiſed in Fee of Land, after having felled Trees thereupon die, and his Executor go upon the Land within a reaſonable Time after his Death to take them away, an Action of Treſpaſs does not lie; becauſe the Law gives an Executor a reaſonable Time to poſſeſs himſelf of the Goods of his Teſtator.

2 Roll. Abr. 567. M.pl.2. 25. If *J. S.* who has a Right to a Pipe, which ſerves as a Watercourſe through the Land of *J. N.* come upon the Land of *J. N.* and dig, in order to unſtop or mend the Pipe, an Action of Treſpaſs does not lie; for the Right of doing both is incident to the Right of Pipe.

Ld. Raym. 725. Young's Caſe. 26. If a Man go with Men or Horſes upon Land which lies contiguous to a navigable River, to tow a Boat or Barge, an Action of Treſpaſs does not lie: Becauſe the doing of this is for the Publick Good.

Bro. Treſp. pl. 213. 27. If *J. S.* dig upon the Land of *J. N.* to raiſe a Bulwark againſt a publick Enemy, an Action of Treſpaſs does not lie; becauſe the doing of this is for the Safety of the Publick.

2 Bulſtr. 62. Cro. Ja. 321. 28. If *J. S.* go into the Ground of *J. N.* to beat or draw for a Fox, Badger, or any Animal of the Vermin Kind, in order to hunt it, an Action of Treſpaſs lies.

2 Bulſtr. 62. Cro. Ja. 321. 29. But if *J. S.* purſue a Fox, Badger, or any Animal of the Vermin Kind, into the Ground of *J. N.* and hunt it there, this Action does not lie; becauſe the Deſtruction of ſuch Animals is for the Public Good.

2 Bulſtr. 62. Cro. Ja. 321. 30. If however the Fox, of which *J. S.* is in Purſuit, run to Earth in the Ground of *J. N.* and *J. S.* dig it out, this Action lies; for the Fox might have been got out without digging.

31. The Point is not perhaps quite ſettled; but it ſeems to be the better Opinion, that if *J. S.* purſue an Animal, not of the Vermin Kind, into the Ground of *J. N.* an Action of Treſpaſs does lie, notwithſtanding the Animal was found in the Ground of *J. S.*

11 Mod. 75. Godb. 122. Salk. 556. 32. It is in ſome Books laid down, that if *J. S.* who has ſtarted a Hare in his own Ground, purſue it into the Ground of *J. N.* and kill it there, an Action of Treſpaſs does not lie; becauſe the local Property in the Hare, which was in *J. S.* is continued by the Puiſuit.

Bro. Treſp. pl. 111. 2 Bulſtr. 61. 33. But it is laid down in other Books, that although *J. S.* who has flown a Hawk at a Pheaſant in his own Ground, is intitled thereto, if it be killed in the Ground of *J. N.* if he go upon the Ground of *J. N.* to take it away, an Action of Treſpaſs lies.

2 Bulſtr. 61. 34. And it is in one Book ſaid, that all Hunting, except for the Deſtruction of Vermin, is unlawful.

35. If this be ſo, it follows, that every Perſon, who hunts an Animal not of the Vermin Kind in the Ground of another, is liable to an Action of Treſpaſs.

1 Inſt. 56. 6. If *J. S.* who is intitled to Corn growing upon the Land in the Poſſeſſion of *J. N.* go thereupon to cut and take it away, an Action of Treſpaſs does not lie; for *Quando Lex aliquid concedit, concedere videtur et id per quod devenitur ad illud.*

1 Ventr. 222. Parrot *v.* Bridges. 37. But if *J. S.* do in ſuch Caſe go upon the Land and cut the Corn before it be ripe, this Action lies: It being neither neceſſary nor proper that Corn ſhould be cut before it is ripe.

Bro. Treſp. pl. 50. pl. 325. Bro. Diſm. pl. 12. 38. If the Perſon, to whom Tithe which has been ſet out belongs, go upon the Land on which it is ſet out, and do what is neceſſary to prepare it for being carried away, an Action of Treſpaſs does not lie.

39. If

39. If *J. S.* be about to diſtrain a Beaſt upon Land holden of him, and the Tenant, after *J. S.* has had a View of the Beaſt upon the Land, drive it, in order to prevent its being diſtrained, into the Land of *J. N.* and *J. S.* follow to diſtrain it there, an Action of Treſpaſs does not lie. 1 Inſt. 161. 2 Roll. Abr. 566. I. pl. 12.

40. If *J. S.* make Coney-Boroughs in his own Ground, and ſome Conies bred therein do Damage in an adjoining Ground of *J. N.* and *J. N.* kill them, an Action of Treſpaſs does not lie; becauſe, as *J. S.* had no Property in the Conies, which are *Feræ Naturæ*, after they were gone out of his own Ground, he is not anſwerable for the Damage done. 5 Rep. 104. Boulſton's Caſe. Cro. Car. 554.

41. An Action of Treſpaſs lies for catching Fiſh in a ſeveral Fiſhery. 1 Inſt. 122. Cro. Car. 554. Salk. 637.

42. It is laid down, that this Action does not lie againſt a Stranger for catching Fiſh in a free Fiſhery; for that, as divers Perſons have a Right to fiſh therein, no one of them can maintain the Action. 1 Inſt. 122. Cro. Car. 554.

43. But *Holt* Ch. J. and *Dolben* J. were of Opinion, upon the Authority of a Writ in the Regiſter, that any one, having a Right to fiſh in a free Fiſhery may maintain this Action againſt a Stranger, who has catched Fiſh therein; and it was ſaid by *Holt* Ch. J. that a free Fiſhery is a very different Thing from a Common Fiſhery. Salk. 637. Smith *v.* Kemp. Carth. 286. Reg. 95. Fitz. N.B. 88.

44. *Giles Eyre* J. was however of a contrary Opinion, and *Carthew* Serjeant who moved in Arreſt of Judgment ſaid, That many Things contained in the Writs in the Regiſter are not at this Day Law.

45. An Action of Treſpaſs does not lie for fiſhing in a River where the Tide flows; becauſe, as the Property in the Soil of all ſuch Rivers is in the King, all Perſons have *prima facie* a Right to fiſh in them. 1 Mod. 105. Anon.

46. If *J. S.* by digging a Ditch in his own Land divert Water from the Mill of *J. N.* and thereupon *J. N.* go upon the Land of *J. S.* and fill up the Ditch with the Earth which was dug thereout, an Action of Treſpaſs does not lie; becauſe *J. S.* was himſelf the firſt Wrong-doer. Bro. Treſp. pl. 186. 9 Rep. 55. 2 Roll. Abr. 565. I. pl. 8.

47. If *J. S.* have a Right of Common on a Piece of Land, and *J. N.* have a Piece of Land adjoining to the Commonable Piece which he is not bound to incloſe, and the Beaſt of *J. S.* which was put upon the Commonable Piece, go upon the Land of *J. N.* an Action lies; for it was the Duty of *J. S* to have prevented this. Bro. Treſp. pl. 345.

48. But if *J. S.* who ought to keep up a Fence between a Cloſe of his and a Cloſe of *J. N.* ſuffer the ſame to be out of Repair, and the Beaſt of *J. N.* go through the Fence into the Cloſe of *J. S.* this Action does not lie; becauſe the Damage happens from the Default of *J. S.* Bro. Treſp. pl. 192. 2 Roll. Abr. 565. I. pl. 3.

49. If *J. S.* be driving a Beaſt in a Highway, which lies through an open Field belonging to *J. N.* and the Beaſt go out of the Highway and feed in the Field, an Action of Treſpaſs lies; for *J. S.* might eaſily have prevented this. Bro. Treſp. pl. 321. 2 Roll. Abr. 566. K. pl. 1.

50. But if a Beaſt, which is driving in ſuch Highway, do againſt the Will of the Driver bite a little of the Corn, or Graſs, which grows by the Side of the Highway, this Action does not lie: Becauſe this could not eaſily have been prevented. Bro. Treſp. pl. 351. 2 Roll. Abr. 566. K. pl. 1.

2. To a Building.

51. If *J. S.* preach in the Church of *J. N.* without the Conſent of *J. N.* an Action of Treſpaſs lies. 12 Mod. 420. Turton *v.* Reignolds.

Plowd. 71. 2 Roll. Abr. 555. X. pl. 1. Godb. 283. 2 Roll. Rep. 208.

52. It is in the general true, that an Action of Treſpaſs lies for going into a Man's Houſe, although the Door be open: For every Man's Houſe is his Caſtle; and he is not obliged to keep the Door ſhut.

2 Roll. Abr. 567. K. pl. 3.

53. If a Mother go into the Houſe of *J. S.* the Door of which is open, to ſee her Daughter a Servant in the Houſe who is ſick, this Action lies.

10 E. 4. 7. pl. 19.

54. If a Beaſt, in driving it through a Street, go into the Houſe of *J. S.* the Door of which is open, this Action lies.

Bro. Treſp. pl. 430.

55. If a Man, whoſe Term in a Houſe is expired, go into it, when the Door is open, to take away Goods left by him there, this Action lies; for it was his own Folly to leave the Goods there.

2 Roll. Rep. 55, 56. Higgins *v.* Andrews. 2 Roll. Abr. 565. I. pl. 2.

56. If *J. S.* go into the Houſe of *J. N.* the Door of which is open, to ſearch for Goods which he has loſt, this Action lies; although it be commonly reported, that the Goods are in the Houſe of *J. N.*

57. But in ſome Caſes an Action of Treſpaſs does not lie for going into a Houſe, the Door of which is open.

Bro. Treſp. pl. 118. pl. 186. Cro. Eliz. 246. 2 Roll. Rep. 56. 2 Lut. 1385.

58. If *J. S.* have unlawfully gotten Goods of *J. N.* into his Houſe, and *J. N.* go thereinto, the Door being open, to take them away, an Action of Treſpaſs does not lie: Becauſe *J. S.* was himſelf the firſt Wrong-doer.

2 Roll. Rep. 55, 56. Higgins *v.* Andrews.

59. If Goods of *J. S.* have been ſtolen, and *J. S.* know that they are in the Houſe of *J. N.* and *J. S.* go therein, the Door being open, to take them away; this Action does not lie.

Bro. Treſp. pl. 16.

60. If the Perſon, in whom the Reverſion of a Houſe is, go thereinto, the Door being open, to ſee if any Waſte be done, this Action does not lie.

Plowd. 71. Kedwelle *v.* Brande.

61. If *J. S.* go into the Houſe of *J. N.* the Door being open, to tender Money, of which a Tender to the Perſon of *J. N.* is neceſſary, this Action does not lie.

Kelw. 46. pl. 2. Anon.

62. If a Man go into a Houſe, the Door being open, to part two who are fighting, this Action does not lie: The doing of this being for the Publick Good.

5 Rep. 91. Semaine's Caſe. 3 Inſt. 162.

63. It is in the general true, that if a Sheriff break open the Door of a Man's Houſe, an Action of Treſpaſs lies. Cro. Jac. 556.

1 Sid. 186. Penton *v.* Brown. 1 Keb. 698.

64. And if a Barn or an Outhouſe be near unto or Parcel of a Houſe, the Privilege of the Houſe extends to it.

1 Sid. 186. Penton *v.* Brown.

65. But if a Barn or an Outhouſe ſtand at a Diſtance from the Houſe, the Privilege of the Houſe does not extend to it.

5 Rep. 93. Semaine's Caſe.

66. The Privilege of a Houſe does however only extend to a Houſe in a Man's own Poſſeſſion; for if the Goods of *J. S.* are, to prevent their being taken in Execution, carried into the Houſe of *J. N.* the Sheriff may, after declaring the Cauſe of his coming, and demanding to have

have the Door of the Houſe opened, break it open to come at the Goods.

67. But in ſome Caſes an Action of Treſpaſs does not lie againſt a Sheriff, for breaking open the Door of a Houſe.

68. If where the King is a Party, the Sheriff break open the Door of a Man's Houſe, either to arreſt him, or to execute a Proceſs, this Action does not lie, provided he do, before he break open the Door, declare the Cauſe of his coming, and demand to have it opened. 5 Rep. 91. Semaine's Caſe. 4 Leon 41.

69. If a Writ of *Habere facias Seiſinam* of a Houſe, or a Writ of *Habere facias Poſſeſſionem*, even at the Suit of a private Perſon, be delivered to the Sheriff, it is lawful for him, after declaring the Cauſe of coming, and demanding to have it opened, to break open the Door of the Houſe to execute either of theſe; for after the Judgment, on which either of theſe Writs muſt be founded, the Houſe is no longer to be conſidered as the Houſe of the Perſon, in whoſe Poſſeſſion it is. 5 Rep. 91. Semaine's Caſe.

70. If a Commiſſion of Rebellion, which has iſſued from the Court of Chancery againſt *J. S.* be delivered to the Sheriff, it is lawful for him after declaring the Cauſe of his coming, and demanding to have it opened, to break open the Door of a Houſe, in which *J. S.* is, in order to arreſt him. Crompt. 47.

71. If a Perſon who has been arreſted, eſcape into a Houſe, it is lawful for the Sheriff, after declaring the Cauſe of his coming, and demanding to have it opened, to break open the Door of the Houſe, in order to retake him. 5 Rep. 93. Semaine's Caſe. 2 Roll. Rep. 138. Palm. 54.

72. If a Sheriff have entered into a Houſe in order to execute a Writ of *Fieri facias*, it is lawful for him, after a Demand to have it opened has been made, to break open any inner Door or any Trunk in the Houſe. 2 Show. 87. Rex v. Bird. Palm. 54.

73. If after a Sheriff's Officer have entered a Houſe, in order to execute a Writ of *Fieri facias*, the Maſter of the Houſe lock the Door, it is lawful for the Sheriff, after a Demand to have it opened has been made, to break it open, for the Sake of ſetting the Officer at Liberty, or compleating the Execution. Cro. Ja. 556. Anon.

74. By the 21 *Ja. c.* 19. *par.* 8. it is enacted, "That it ſhall be lawful to Commiſſioners of Bankruptcy, or the greater part of them, or to any Perſon, by them or the greater Part of them deputed by Warrant under their Hands and Seals, to break open the Houſe or Houſes, Chambers, Shops, Warehouſes, Doors, Trunks or Cheſts, of the Bankrupt, where the ſaid Bankrupt, or any of his Goods ſhall be, or be reputed to be, and to ſeize the ſame."

75. By the 11 *Geo.* 2. *c.* 19. *par.* 7. it is enacted, "That where any Goods or Chattels, fraudulently and clandeſtinely carried away by any Tenant, Leſſee, or any Perſon aiding or aſſiſting therein, ſhall be put into any Houſe, Barn, Stable, Outhouſe or Place, locked up or otherwiſe ſecured, to prevent ſuch Goods or Chattels from being taken as a Diſtreſs for Arrear of Rent; it ſhall be lawful for the Landlord, or any Perſon impowered by him, to take as a Diſtreſs for Rent ſuch Goods or Chattels (firſt calling to his Aſſiſtance the Conſtable or other Peace Officer of the Hundred, Borough, Pariſh, Diſtrict or Place, where the ſame ſhall be ſuſpected to be concealed, who are hereby required to aid and aſſiſt therein, and in Caſe of a Dwelling-Houſe, Oath being firſt made, before ſome Juſticeof the Peace, of a reaſonable Ground to ſuſpect that ſuch Goods or Chattels are therein) in the Day-Time; and to break open ſuch Houſe, Barn, Stable, Outhouſe and Place, and to

"take

" take and seize such Goods and Chattels for the said Arrear of Rent, as " he might have done, if such Goods or Chattels had been in any open " Field or Place."

5 Rep. 93. Semaine's Case. Moor 606.

76. If a Peace-Officer, who has the Warrant of a Justice of the Peace to arrest a Man, in order to his finding Surety for his good Behaviour, after declaring the Cause of his coming, and demanding to have it opened, break open the Door of a House in which he is, in order to arrest him, an Action of Trespass does not lie.

2 Jon. 133, 134. Anon.

77. If a Peace-Officer have the Warrant of a Justice of the Peace, for levying upon the Goods of *J. S.* the Penalty of a Statute, Part of which is given to the King, it is lawful for him, after declaring the Cause of his coming, and demanding to have it opened, to break open the Door of the House of *J. S.* in order to execute the Warrant.

Bro. Faux, Impr. pl. 6. 2 Hawk. P. C. 86.

78. If an Affray in a House be seen or heard by a Peace-Officer, it is lawful for him, after declaring the Cause of his coming, and demanding to have it opened, to break open the Door of the House, in order to arrest the Affrayers.

Bro. Faux, Impr. pl. 6. 2 Hawk. P. C. 86.

79. If a Person, who has in the Presence of a Peace-Officer made an Affray, flee into a House, it is lawful for the Peace-Officer, after declaring the Cause of his coming, and demanding to have it opened, to break open the Door of the House, in order to arrest him.

Bro. Tresp. pl. 330. 2 Hawk. P. C. 86.

80. It is lawful for a private Person, after declaring the Cause of his coming, and demanding to have it opened, to break open the Door of a House, in which a Person who has committed a Felony or given a dangerous Wound is, in order to arrest him; the good of the Publick requiring this to be done.

1 H.H.P.C. 579. Foft. 321.

81. It is lawful for a Peace-Officer, having a Warrant from a Justice of the Peace to arrest a Person upon a Suspicion of Felony, after declaring the Cause of his coming, and demanding to have it opened, to break open the Door of the House in which he is, in order to arrest him.

Bro. Tresp. pl. 186. 2 Leon. 202.

82. If *J. S.* who is unlawfully confined by *J. N.* in his House, in order to regain his Liberty break open the Door of the House, he is not liable to an Action of Trespass: Because *J. N.* was himself the first Wrong-Doer.

Bro. Tresp. pl. 186.

83. If *J. S.* through Negligence suffer his House to take Fire, and the Person who lives in an adjoining House, pull down the House of *J. S.* in order to preserve his own House, an Action of Trespass does not lie.

Comb. 417. Lovey *v.* Arnold.

84. An Action of Trespass does not lie for pulling down a House, which is a Nusance in a Highway.

(G) Against whom an Action of Trespass may be be brought.

1. In the General.

Hob. 14. Weaver *v.* Ward. Bro. Tresp. pl. 213. pl. 310. Latch 13, 110.

1. AN Action of Trespass may be brought against a Lunatick, notwithstanding he is incapable of Design; for wherever one Person receives an Injury from the voluntary Act of another, this is a Trespass, although there were no Design to injure.

2. Every

2. Every Party to a Treſpaſs is liable to an Action of Treſpaſs; for there can be no Acceſſary in Treſpaſs. Bro. Treſp. pl. 113. 1 Lev. 124.

3. If *A.* command or requeſt *B.* to take the Goods of *C.* and *B.* do it, this Action lies as well againſt *A.* as againſt *B.* Salk. 409. Britton *v.* Cole.

4. If *J. S.* agree to a Treſpaſs which has been committed by *J. N.* for his Benefit, this Action lies againſt *J. S.* although it was not done in Obedience to his Command, or at his Requeſt. Bro. Treſp. pl. 113. pl. 256.

5. But if *J. S.* be compelled by *J. N.* to commit a Treſpaſs, the latter is only liable to an Action of Treſpaſs; for no Perſon can be guilty of a Treſpaſs, unleſs he act voluntarily. Sty. 65. Smith *v.* Slone.

6. If divers Perſons have been guilty of a Treſpaſs, the Party injured may bring an Action of Treſpaſs againſt them all, or againſt any one or more of them. 8 Rep. 159. Blackamore's Caſe. Bro. Treſp. pl. 20. pl. 150.

7. But, if the Party injured by a Treſpaſs have brought an Action of Treſpaſs againſt one of the Parties to the Treſpaſs, he cannot bring a ſecond Action againſt any other of them: For, although the Defendant in the ſecond Action be a Stranger to the Record in the firſt, he may, being a Party to the Treſpaſs, plead the Pendency of the firſt Action in Abatement of the ſecond; or he may plead the Acquittal or Judgment in the firſt Action in Bar of the ſecond. Cro. Eliz. 667. Ferrers *v.* Arden. 6 Rep. 7. Carth. 96. Hob. 137.

8. If *J. S.* who has bailed a Beaſt to *J. N.* for a Time certain, take it away before the Expiration of the Time, he is not liable to an Action of Treſpaſs: For the Perſon, who has only a ſpecial Property in a Chattel, can never maintain this Action againſt him who has the general Property: But the Remedy of *J. N.* is an Action upon the Caſe. Bro. Treſp. pl. 92.

9. If *J. S.* kill a Beaſt, which has been bailed generally to him, an Action of Treſpaſs does not lie againſt *J. S.* For by the Bailment a general Confidence was placed in him; and the Remedy for an Abuſe of Confidence is an Action upon the Caſe. Bro. Treſp. pl. 295. 5 Rep. 14. Cro. Eliz. 784.

10. But if *J. S.* kill a Beaſt, which has been bailed to him for a particular Purpoſe, as to plough his Land, he is liable to this Action: Becauſe a general Confidence was not placed in him by the Bailment. 1 Inſt. 57. Bro. Treſp. pl. 295. 5 Rep. 13. Cro. Eliz. 784.

11. If a Servant, who is intruſted to ſell Goods in his Maſter's Shop, carry any of them away, an Action of Treſpaſs lies; for the Confidence placed in him extends only to the ſelling of the Goods in the Shop. 1 Leon. 87. Gloſſe *v.* Hayman.

12. If the Goods of his Maſter, with which a Servant is intruſted, are injured by a Male-feaſance of the Servant, an Action of Treſpaſs lies. Bro. Treſp. pl. 295.

13. But if through the Neglect of a Servant, to whoſe Care the Goods of his Maſter are committed, they receive an Injury, this Action does not lie: But the Remedy, the Injury ariſing from a Non-feaſance, is an Action upon the Caſe. 5 Rep. 14. 8 Rep. 146. Ld. Raym. 198.

14. If a Servant, who by the Command of his Maſter has lawfully diſtrained a Horſe, uſe the Horſe, or kill it, the Maſter is not liable to an Action of Treſpaſs; but the Servant, who by his own tortious Act becomes a Treſpaſſer *ab Initio*, is liable thereto. Bro. Treſp. pl. 211.

15. If a Sheriff's Officer take the Goods of *J. S.* under a Writ of *Fieri Facias*, after he has committed an Act of Bankruptcy, and afterwards the Goods are aſſigned under a Commiſſion of Bankruptcy; an Action of Treſpaſs does not lie againſt the Officer, although the Goods do by Relation become the Property of the Aſſignees from the Time of committing the Act: For, as the Officer might not know that *J. S.* had committed an Act of Bankruptcy, or that an Aſſignment of the Goods would be made; and 1 Lev. 174. Baily *v.* Bunning. 3 Lev. 192. 1 Show. 12.

and as it was his Duty to execute the Writ, it would be unreaſonable to puniſh him as a Wrong-doer.

Bro. Treſp. pl. 564. 2 Roll Abr. 552. O. pl. 3. pl. 9. Carth. 381.

16. If the Goods of *J. S.* are taken by a Sheriff's Officer, who has a Writ of *Fieri Facias* to levy of the Goods of *J. N.* an Action of Treſpaſs lies againſt him; becauſe he was only authorized to take the Goods of *J. N.*

Carth. 381. Hallet *v.* Burt.

17. An Action of Treſpaſs does not lie againſt a Sheriff's Officer, who under a Writ of Replevin has taken the Goods of *J. S.* in the Room of the Goods of *J. N.* becauſe this Writ is different from a Writ of *Fieri Facias*. By the former the Officer is commanded to take certain Goods therein ſpecified: By the latter he is only commanded to levy of the Goods of *J. N.*

Ibid.

18. But if the Owner of the Goods, taken under a Writ of Replevin, claimed a Property in them at the Time of Taking; and the Officer did notwithſtanding this Claim carry them away, without having the Property determined upon a Writ *De Proprietate probanda*, this Action lies againſt him.

10 Mod. 24. Templeman's Caſe.

19. If a Stranger have officiouſly aſſiſted a Sheriff, or his Officer, in the Execution of a Writ of *Fieri Facias* which iſſued upon a regular Judgment, he is not liable to an Action of Treſpaſs; for it is not only lawful, but it is the Duty of every Man, to aſſiſt in the Execution of ſuch Writ.

Str. 509. Philips *v.* Biron. Raym. 73.

20. An Action of Treſpaſs does not lie againſt a Sheriff or his Officer, or againſt a Perſon who by the Command of either of them has aſſiſted him, for any Thing done by Virtue of a Writ of *Fieri Facias* which iſſued upon an erroneous Judgment: Becauſe the Fault is not in ſuch Caſe in the Sheriff or his Officer, but in the Court or ſome Officer thereof.

Str. 509. Philips *v.* Biron. Raym. 73.

21. But if a Stranger have officiouſly aſſiſted a Sheriff or his Officer in the Execution of ſuch Writ, he is liable to this Action: Becauſe, as he acted voluntarily, it was incumbent upon him to take Care, that there was a regular Judgment to warrant the iſſuing of the Writ.

12 Mod. 178. Britton *v.* Cole, Hil. 9 W. 3.

22. It is in one Caſe ſaid, that an Action of Treſpaſs does not lie againſt a Sheriff or his Officer, or againſt a Perſon who by the Command of either of them has aſſiſted him, for any Thing done by Virtue of a Writ of *Fieri Facias*, although there were no Judgment to warrant the iſſuing of the Writ; for as the Sheriff and his Officer, and the Aſſiſtant, have only paid Obedience to the Writ, neither of them ought to be puniſhed as a Wrong-doer.

Ld. Raym. 733. Lake *v.* Billers, Hertford Lent Aſſizes 1698.

23. But in a Caſe ſoon after it was ruled by *Holt* Ch. J. that, in an Action of Treſpaſs againſt a Sheriff for levying Goods under a Writ of *Fieri Facias*, it is incumbent upon the Sheriff, to give in Evidence a Copy of the Judgment upon which the Writ iſſued.

Bro. Treſp. pl. 256. pl. 329. pl. 358.

24. It is laid down, in divers Caſes, that if *A.* take the Goods of *B.* and afterwards *C.* take them from *A. B* cannot maintain an Action of Treſpaſs againſt *C.* Becauſe *A.* did acquire a general Property in the Goods by the firſt Taking, notwithſtanding it was a tortious one; and conſequently the Property of *B.* was diveſted.

Sid. 438.

25. But it is ſaid in one Caſe, that *B.* may in ſuch Caſe maintain this Action againſt *C.* for that *A.* did not acquire a general Property in the Goods by the firſt Taking.

2 Hawk. P. C. 81. 10 Rep. 76.

26. Heretofore, if a Peace-Officer had arreſted a Perſon under the Warrant of a Juſtice of Peace, for an Offence of which it appeared upon the Face of the Warrant that the Juſtice had no Juriſdiction, he would have been liable to an Action of Treſpaſs.

27. But

27. But by the 24 *Geo.* 2. *cap.* 44. *par.* 6. it is enacted, "That no "Action ſhall be brought againſt any Conſtable or other Officer, or againſt "any Perſon acting by his Order or in his Aid, for any Thing done in "Obedience to any Warrant under the Hand or Seal of any Juſtice, un-"til Demand hath been made in Writing, ſigned by the Party intending "to bring ſuch Action, of the Peruſal and Copy of ſuch Warrant, and "the ſame hath been refuſed, or neglected, for the Space of ſix Days after "ſuch Demand."

2. For an Injury to Real Property.

28. If the Perſon, who has granted the Veſture of Land in which he has a Freehold, diſturb the Grantee in the Enjoyment thereof, an Action of Treſpaſs lies againſt him. Bro. Treſp. pl. 273. Dyer 285.

29. But if *J. S.* have only a Right of a free Warren in the Land of *J. N.* and *J. N.* deſtroy Coney-Boroughs in the Land, this Action does not lie againſt *J. N.* The Remedy of *J. S.* being an Action upon the Caſe. 2 Roll. Abr. 552. L. pl. 4.

30. It is in the general true, that an Action of Treſpaſs lies againſt the Lord of whom Land is holden, for an Injury done to the Land. 2 Inſt. 105. Bro. Treſp. pl. 16. pl. 273. pl. 344. pl. 384.

31. But this Action does not lie againſt the Lord of whom Land is holden for making a Diſtreſs thereupon; it being by the Statute of *Marlbridge* provided, that if a Lord make an unreaſonable Diſtreſs, or make a Diſtreſs when nothing is due to him, he ſhall not be liable to a Fine, but ſhall be grievouſly amerced: Whereas if this Action would lie, he would be liable to Fine. 2 Inſt. 105. Str. 851. Sayer 184.

32. It has been holden, that this Statute extends to every Lord of whom Land is holden; although the Tenant be only a Tenant at Will. Finch Law. lib. 3. c. 6. 2 Inſt. 105. Bro. Treſp. pl. 29. 344.

33. But if a Lord's Bailiff make an unreaſonable Diſtreſs, or make a Diſtreſs when nothing is due to the Lord, this Action lies againſt the Bailiff; for the Privilege of being exempted therefrom, is confined by the Statute to the Perſon of the Lord. 2 Inſt. 105.

34. If the Lord of whom Land is holden drive a Beaſt, which he has diſtrained upon the Land of his Tenant in one County, to the Manor-Pound in another County, he is not liable to an Action of Treſpaſs: Becauſe, as the Tenant is ſuppoſed to know where the Manor-Pound is, he knows where to carry Suſtenance for his Beaſt. 2 Inſt. 106.

35. If the Lord of whom Land is holden drive a Beaſt, which he has diſtrained upon the Land of his Tenant in one County, to an open Pound in another County, an Action of Treſpaſs does not lie againſt the Lord; but he is liable to an Action upon the Statute of *Marlbridge*: Becauſe, as the Owner does not know to what Pound the Beaſt is driven, he does not know where to carry Suſtenance for it; and conſequently the Beaſt, no other Perſon being obliged to do this, may be ſtarved. 2 Inſt. 106.

36. It was in one Caſe holden by the Court of King's Bench, that a Tenant by Copy of Court-Roll may maintain an Action of Treſpaſs againſt his Lord, for cutting down Trees on the Land holden by Copy of Court-Roll; and the Judgment of this Court was affirmed in the Exchequer-Chamber: But the Judgment was afterwards reverſed in the Houſe of Lords; and it was ſaid, that, as a Copyholder cannot cut down Trees except for neceſſary Repairs or for Eſtovers, if his Lord cannot do this, many good Trees muſt periſh, which would be a Loſs to the Publick. Salk. 638. Aſhmead *v.* Ranger.

37. If

2 Roll. Abr. 554. Holcombe v. Rawlins. Bro. Treſp. pl. 35. Cro. Eliz. 540.

37. If *A.* diſſeiſe *B.* and *C.* diſſeiſe *A.* and afterwards *B.* re-enter, he may maintain an Action of Treſpaſs againſt *C.* Becauſe by the Re-entry of *B.* he reduces the Poſſeſſion to himſelf from the Time of the firſt Diſſeiſin.

Bro. Treſp. pl. 35. 302.

38. It is laid down, that if a Diſſeiſor make a Leaſe or Feoffment, and afterwards the Diſſeiſee re-enter, he cannot, although he thereby reduce the Poſſeſſion to himſelf from the Time of the Diſſeiſin, maintain an Action of Treſpaſs againſt the Leſſee or Feoffee: Becauſe the Leſſee or Feoffee came in by Title.

Cro. Eliz. 540. Holcombe v. Rawlins, Hil. 39. Eliz.

39. But it has been holden in one Caſe, that the Diſſeiſee may in ſuch Caſe maintain this Action againſt the Leſſee or Feoffee, notwithſtanding the Leſſee or Feoffee came in by Title.

11 Rep. 51. Liford's Caſe, Mich. 12 Ja. 1. Hetl. 66. Symons v. Symons, Hil. 3. Car. 1.

40. The former ſeems to be the better Opinion; for it has been holden in two ſubſequent Caſes, that the Diſſeiſee cannot in ſuch Caſe, maintain an Action of Treſpaſs againſt either the Leſſee or Feoffee.

Cro. Ja. 204. Stodden v. Hervey.

41. If a Tenant for Life of Land die, and his Executor go upon the Land within a few Days after his Death, to remove the Cattle of his Teſtator, an Action of Treſpaſs does not lie againſt the Executor: Becauſe, as the Time of the Determination of the Tenancy was uncertain, it is reaſonable, that the Executor ſhould have a convenient Time to remove the Cattle.

5 Rep. 13. The Counteſs of Salop's Caſe. Bro. Treſp. pl. 430.

42. If a Leſſee for Life or Years of Land, who is not reſtrained from ſo doing, cut down Trees, an Action of Treſpaſs does not lie: Becauſe, the Leſſee has an Intereſt in the Land by the Act of the Owner; and it was the Folly of the Owner, that he did not, when he demiſed the Land, reſtrain the Leſſee from cutting down Trees.

Ld. Raym. 739. Glenham v. Hanby.

43. *A.* demiſed a Paſture to *B.* but the Trees were excepted in the Demiſe. The Cattle of *B.* which were afterwards put into the Paſture, barked the Trees. It was ruled by *Holt* Ch. J. to whom the Point was referred, that an Action of Treſpaſs did not lie againſt *B.*

5 Rep. 13. The Counteſs of Salop's Caſe. 1 Inſt. 57. Cro. Eliz. 784.

44. An Action of Treſpaſs does not lie againſt a Tenant at Will for an Injury to a Building or the Land by him holden, which ariſes from a mere Non-feaſance.

5 Rep. 13. The Counteſs of Salop's Caſe. 1 Inſt. 57. Bro. Treſp. pl. 362. Cro. Eliz. 784.

45. But if a Tenant at Will cut down Trees, or do any other poſitive Injury to a Land or a Building by him holden, this Action lies againſt him; becauſe every ſuch injurious Act amounts to a Determination both of his Eſtate and Poſſeſſion.

2 Roll. Abr. 546. B. pl. 1.

46. It is laid down in one Caſe, that if the Beaſt of *A.* which is agiſted by *B.* Treſpaſs in the Cloſe of *C.* it is in the Election of *C.* to bring an Action of Treſpaſs againſt *A.* or *B.*

Clayt. 33. Bateman's Caſe.

47. But it is laid down in another Caſe, that this Action does in ſuch Caſe only lie againſt the Agiſtor of the Beaſt.

48. If

48. If a Close in the Possession of *A.* lie contiguous to a Close in the Possession of *B.* and a Close in the Possession of *C.* lie contiguous to a Close in the Possession of *B.* and a Fence between the Closes of *A.* and *B.* which *A.* ought to keep in Repair, be out of Repair; and a Fence between the Closes of *B.* and *C.* which *B.* ought to keep in Repair, be likewise out of Repair; and the Beast of *C.* escape through the Fence of *B.* and afterwards through the Fence of *A.* into the Close of *A.* *A.* may maintain an Action of Trespass against *C.* Because *A.* was only bound to keep his Fence in Repair against the Beasts which *B.* should put into his Close, and not against the Beasts of all Persons which should come into the Close of *B.* But, as the Damage which *C.* sustains by the Recovery of *A.* against him is owing to the Default of *B.* in not keeping his Fence in Repair, *C.* may recover a Satisfaction in an Action upon the Case against *B.* Bro. Tresp. pl. 439. Jenk. Cent. 161. 1 Freem. 379.

49. If a Servant, without the Knowledge of his Master, put his Master's Beast into the Close of *J. S.* this Action does not lie against the Master; because, by taking upon himself to do this, the Servant did acquire a special Property for the Time in the Beast: But the Servant is, in Consequence of the special Property by him acquired, liable to this Action. 2 Roll. Abr. 553. Q. pl. 1.

50. But if a Wife do, without the Knowledge of her Husband, put her Husband's Beast into the Close of *J S* an Action of Trespass lies against the Husband; because a married Woman cannot acquire any Property in the Goods of her Husband. Ibid.

(H) In what Court an Action of Trespass may be brought.

1. AT the Common Law the superior Courts had not Jurisdiction in an Action, unless the Debt or Damages amounted to forty Shillings. 2 Inst. 311, 312.

2. By the Statute of *Glouceſter*, *c* 8. it is in Affirmance of the Common Law enacted, "That no Person shall from henceforth have a Writ of "Trespass before the Justices, unless he swear by his Faith, that the Goods "taken away were worth forty Shillings at the least."

3. The Sanction of an Oath was by this Statute added, for the Sake of more effectually confining Actions in which the Damages were under forty Shillings to inferior Courts: But, the Consequences of obliging a Plaintiff to take an Oath of this Kind being found very dangerous, the Practice of requiring an Oath was soon discontinued. 2 Inst. 311.

4. It is in divers Books laid down, that although the Statute of *Glouceſter* speaks of a Writ of Trespass generally, it does only mean a Writ of Trespass upon the Case; because no inferior Court can hold Plea of Trespass with Force. 1 Inst. 118. 2 Inst. 311, 312. Fitz. N. B. 47.

5. And the Doctrine of these Books is recognized in a modern Case. In an Action of Trespass, which was brought in the Court of King's Bench, the Damages laid in the Declaration were only twenty Shillings. Upon a Demurrer it was objected, that the Court had not a Jurisdiction, the Damage appearing upon the Face of the Declaration to be under forty Shillings: Carth. 108. Lambert *v.* Thurston.

Shillings: But the Objection was over-ruled. And by the Court—If an Action for a Treſpaſs with Force, in which the Damage is under forty Shillings, do not lie in a ſuperior Court, the Party injured would be without Redreſs; for a Fine cannot be aſſeſſed by an inferior Court, and conſequently an Action of Treſpaſs does not lie in an inferior Court.

6. By the 5 *W. & M. c.* 12. it is enacted, "That from henceforth "no Writ, commonly called a *Capias pro fine*, ſhall iſſue againſt any De- "fendant, againſt whom Judgment has been entered up in an Action of "Treſpaſs *Vi et Armis*. But the ſame Fine is and ſhall be hereby remitted "and diſcharged."

Salk. 54. 7. Since the making of this Statute it has been the Practice of the Court of Common Pleas, to inſert the Words *Nihil de fine quia remittitur per Statutum*, in entering up Judgment in an Action of Treſpaſs.

Carth. 390. Linſey *v.* Clerk, Mich. 8 W. 3. Salk. 54. 8. But a Queſtion ariſing in the Court of King's Bench, ſoon after the making of this Statute, in what Manner Judgment in an Action of Treſpaſs ought to be entered up, it was after Debate holden, that the Clauſe *quod Capiatur pro fine* ought to be entirely omitted, for that, as the Statute has diſcharged the Fine, no Notice ought to be taken thereof in entering up Judgment.

Ld. Raym. 273. Courtney *v.* Collet, Mich. 9 W. 3. 12 Mod. 164. S. C. 9. In a Caſe not long after in the ſame Court it is ſaid by two Reporters to have been holden, that the Clauſe *Quod capiatur pro fine* ought ſtill to be inſerted, in entering up Judgment in an Action of Treſpaſs.

Carth. 436. 10. But this is probably a Miſtake in theſe Reporters, for another Reporter of the ſame Caſe is ſilent as to the Point; and it ſeems extremely ſtrange, that the ſame Court ſhould ſo ſoon after, and without taking the leaſt Notice thereof, depart from what was ſolemnly determined in the Caſe of *Linſey* v. *Clerk*.

11. Although the Fine due to the Crown be by the 5 *W. & M. c.* 12. taken away, and the Clauſe *Quod capiatur pro fine* be omitted in entering up Judgment in an Action of Treſpaſs, this Action does not even at this Day lie in an inferior Court.

12. For by the ſame Statute, *par.* 2. it is enacted, "That the Plaintiff "in every Action of Treſpaſs *Vi et Armis* ſhall upon ſigning Judgment "therein, over and above the uſual Fees, pay to the proper Officer who "ſigneth the ſame the Sum of ſix Shillings and eight Pence, in full Satisfac- "tion of the Fine due to the Crown, and of all Fees due for or concerning "the ſame, to be diſtributed in ſuch Manner as Fines and Fees of this "Kind have uſually been."

13. As a Sum of Money is to be paid in Satisfaction of the Fine due to the Crown, and this is to be diſtributed in the ſame Manner as the Fine had uſually been diſtributed, it follows, that only ſuch Courts, as could before the making of this Statute have aſſeſſed a Fine, are capable of receiving Money in Lieu of the Fine, or of diſtributing it as the Money heretofore paid as a Fine had been uſually diſtributed; and conſequently, that an Action of Treſpaſs does not at this Day lie in an inferior Court.

(I) Of the Pleadings in an Action of Treſpaſs.

1. Of the Writ.

1. IT is laid down in divers Books, that, if the Words *Vi et Armis* are omitted in a Writ of Treſpaſs, the Writ abates; for that theſe are Words of Subſtance. Fitz. N. B. 86. Cro. Ja. 443, 526, 536. Cro. Car. 407. Salk. 636.

2. It has indeed in one modern Caſe been holden, that the Words *Vi et Armis* are Words of Form, and conſequently that the Writ does not abate on Account of their being omitted. 1 Saund. 81. Law v. King. Trin. 19 Car. 2.

3. The Determination in this Caſe ſeems to have been founded upon what is laid down in two old Caſes. In theſe it is laid down, that if, upon a Demurrer to a ſpecial Plea in an Action of Treſpaſs *Vi et Armis*, the Court ſhall give Judgment for the Defendant as to the Matter ſpecially pleaded, there ſhall be no further Enquiry concerning the Force, although Iſſue have been thereupon joined. It is in theſe likewiſe laid down, that if the Court ſhall give Judgment upon the Demurrer for the Plaintiff as to the Matter ſpecially pleaded, the Iſſue joined upon the Force ſhall not be tried: But a *Capias pro fine* ſhall as well be awarded, as if this Iſſue had been found for the Plaintiff. 7 H. 6. 13. 1 H. 7. 19.

4. The Determination in the Caſe of *Law* v. *King* is not warranted by the two old Caſes. All that can be fairly inferred from them is, that, if there be Judgment upon the Demurrer that the Act juſtified was lawful, it ſhall be intended that the Force accompanying it was alſo lawful; or that, if there be Judgment upon the Demurrer that the Act juſtified was unlawful, it ſhall be intended that the Force accompanying it was alſo unlawful. The Conſequence of this Inference is, that it would in either Caſe be quite nugatory to try the Iſſue joined upon the Force: But it does by no Means follow, that the Words *Vi et Armis* are Words of Form.

5. It is ſaid by *Holt* Ch. J. that ſince the making of the Statute of the fifth of *W. & M. c.* 12. it is not neceſſary to inſert the Words *Vi et Armis* in a Writ of Treſpaſs: Becauſe the Writ of *Capias pro fine*, which did before iſſue upon a Judgment againſt the Defendant in an Action of Treſpaſs, is thereby taken away. Ld. Raym. 985. Day v. Muſket.

6. But this *Dictum* does not ſeem to be well founded. For by the ſame Statute, *par.* 2. it is enacted, "That the Plaintiff in every Action, wherein "a *Capias pro fine* would before the making thereof have iſſued, ſhall upon "ſigning Judgment in ſuch Action, over and above the uſual Fees for the "ſigning thereof, pay to the proper Officer who ſigneth the ſame the Sum "of ſix Shillings and eight Pence, in full Satisfaction of the Fine due to the "Crown, and of all Fees due for or concerning the ſame, to be diſtri-"buted in ſuch Manner as Fines and Fees of this Kind have uſually "been."

7. It can never be fairly inferred from this Statute, that the Neceſſity of inſerting the Words *Vi et Armis* in a Writ of Treſpaſs is thereby taken away. On the contrary, the Inſertion of theſe Words ſeems to be ſtill quite neceſſary, in order to let in the Proviſions of the Statute, for the Payment

ment and Diſtribution of the Money, which is to be paid in Lieu of the Fine thereby diſcharged.

8. It is moreover enacted by the 16 & 17 *Car.* 2. *c.* 8. *par.* 1. "That, "if any Verdict of twelve Men ſhall be given in any Action, in any of his "Majeſty's Courts of Record at *Weſtminſter*, or in the Courts of Record "in the Counties Palatine of *Cheſter*, *Lancaſter*, or *Durham*, or in his "Majeſty's Courts of Great Seſſions in *Wales*, Judgment thereupon ſhall "not be ſtayed or reverſed for Default or Lack of Form, or by Reaſon of "the Omiſſion of the Words *Vi et Armis*; provided the Cauſe has been "tried by a Jury of the proper County or Place where the Action is laid: "But ſuch Omiſſion ſhall be amended."

9. This Clauſe amounts to a legiſlative Declaration, that the Words *Vi et Armis* in a Writ of Treſpaſs are Words of Subſtance: For, as all Defaults in Matters of Form are by the former general Words of this Clauſe declared to be after a Verdict amendable, if theſe are Words of Form, it is quite nugatory to declare again, that the Omiſſion of the Words *Vi et Armis* in a Writ of Treſpaſs ſhall after a Verdict be amended.

Fitz. N. B. 93. Carth. 66. 1 Show. 28. Salk. 636.

10. If a Writ of Treſpaſs do not conclude *contra pacem*, it abates; for, as every Treſpaſs with Force is a Breach of the Peace as well as a private Injury, theſe are Words of Subſtance.

Salk. 641. Day *v.* Muſket.

11. If a Writ of Treſpaſs be ſued out in the Time of the King that now is, for a Treſpaſs committed in the Time of a deceaſed King, the Concluſion muſt be *contra pacem* of the deceaſed King.

12. The Omiſſion of the Words *contra pacem* in a Writ of Treſpaſs is amendable after a Verdict. For by the 16 & 17 *Car.* 2. *c.* 8. *par.* 1. it is enacted, "That, if any Verdict of twelve Men ſhall be given in any Action, "in any of his Majeſty's Courts of Record at *Weſtminſter*, or in the Courts "of Record in the Counties Palatine of *Cheſter*, *Lancaſter* or *Durham*, or "in his Majeſty's Courts of Great Seſſions in *Wales*, Judgment thereupon "ſhall not be ſtayed or reverſed by Reaſon of the Omiſſion of the Words "*contra pacem*; provided the Cauſe has been tried by a Jury of the proper "County or Place where the Action is laid: But ſuch Omiſſion ſhall be "amended."

2. Of the Declaration.

1. In the General.

Gilb. Hiſt. C. P. 3. Bro. Treſp. pl. 112.

13. As the Complaint in a Writ of Treſpaſs is general, divers Treſpaſſes may be alledged in the Declaration upon one Writ.

2 Lill. Pr. Reg. 728.

14. And for the ſame Reaſon, Treſpaſſes in different Vills may be alledged in the Declaration upon one Writ; provided the different Vills are in the Bailiwick of the Sheriff to whom the Writ is directed.

Str. 420. Bayly *v.* Raby and others.

15. The Plaintiff in an Action of Treſpaſs againſt ſeveral Perſons for a joint Treſpaſs may declare againſt every one of them ſeparately.

16. But if it appear upon the Face of the Declaration in an Action of Treſpaſs, that another certain Perſon, as well as the Perſon againſt whom the Action is brought, was a Party to the Treſpaſs, the Declaration is bad for Want of having made that Perſon a Defendant.

17. A Declaration in an Action of Treſpaſs was holden to be bad: Becauſe the Allegation was, that *A. ſimul cum B.* committed the Treſpaſs, and the Action was brought againſt *A.* only. 1 Leo. 41. Henley *v.* Broad.

18. But it was in this Caſe laid down, that if it be alledged in the Declaration in ſuch Action, that *A. ſimul cum* another Perſon to the Plaintiff unknown committed the Treſpaſs, the Declaration is good; becauſe it is not in the Plaintiff's Power to make an unknown Perſon a Defendant.

19. If the Declaration in an Action of Treſpaſs be in theſe Words, *Quod cum* the Defendant did the Thing complained of, it is bad: Becauſe theſe Words, which are only by Way of Recital, do not amount to an affirmative Charge. 2 Bulſtr. 215. Sherland *v.* Heaton. 2 Lev. 206. 2 Show. 27, 295. Salk. 636. Ld. Raym. 1413. Str. 1151, 1162.

20. If the Declaration in an Action of Treſpaſs be in theſe Words, *Quare* the Defendant did the Thing complained of, it is bad; inaſmuch as the Charge, where the Word *Quare* is uſed, it being a Word of Interrogation, is leſs affirmative than where the Words *Quod cum* are uſed. Salk. 636. Hore *v.* Chapman.

21. It has been holden in the Court of Common Pleas, that although the Words *Quod cum*, or the Word *Quare*, is uſed in the Count in an Action of Treſpaſs, the Fault is cured by the Writ, which is in this Court Part of the Declaration. 1 Barn. 176. Warren *v.* Lapdon, Eaſt. 8 G. 2.

22. It ſeems however to have been doubted by the Court of King's Bench, whether there are in the Writ of Treſpaſs Words ſufficiently affirmative to cure the Defect of Affirmation in the Count, occaſioned by the Words *Quod cum*, or *Quare:* For in a Caſe not many Years before that of *Warren* v. *Lapdon*, wherein it had been holden by the Court of Common Pleas that there are, which came before the Court of King's Bench upon a Writ of Error, the latter Court never came to a Determination. 1 Barn. 176. Clark *v.* Lucas, Mich. 2 G. 2.

23. But whatever Doubt there may formerly have been in the Court of King's Bench as to this Point, it is now at an End; for in a Caſe ſubſequent to the Caſe of *Clark* v. *Lucas* it is laid down, that in the Court of Common Pleas the Words in the Writ of Treſpaſs are ſufficiently affirmative to cure the Defect of Affirmation in the Count, occaſioned by the Words *Quod cum*, or *Quare*. MS. R. Smith *v.* Reynolds, Trin 10 G. 2. in K. B.

24. It has in two Caſes been holden by the Court of King's Bench, that the Declaration in an Action of Treſpaſs, which is bad by Reaſon of the Words *Quod cum*, or the Word *Quare*, being therein contained, may be amended from the Bill filed; provided this be ſufficient to warrant the Amendment; and that the Court will not inquire into the Time of filing the Bill. Str. 1151. Wilder *v.* Handy, Eaſt. 14 Geo. 2. Ibid. 1162. Marſhal *v.* Rigs, Hil. 15 Geo. 2.

25. The Words *Vi et Armis* ought to be inſerted in the Declaration in an Action of Treſpaſs. Salk. 636. Cro. Ja. 443.

26. But the Declaration is not bad for Want of theſe Words, if the Action be brought in the Court of Common Pleas: Becauſe, as the Writ is in this Court Part of the Declaration, the Want of theſe Words in the Count is cured by their being in the Writ. 1 Sid. 187. Jones *v.* Pritchard. Lutw. 1510.

27. The Omiſſion of the Words *Vi et Armis* in the Declaration in an Action of Treſpaſs, although not otherwiſe cured, is amendable after a Verdict: It being by the 16 & 17 *Car.* 2. *c.* 8. *par.* 1. enacted, "That, "if any Verdict of twelve Men ſhall be given in any Action, in any of his "Majeſty's Courts of Record at *Weſtminſter*, or in the Courts of Record "in the Counties Palatine of *Cheſter*, *Lancaſter*, or *Durham*, or in his "Majeſty's

" Majeſty's Courts of Great Seſſions in *Wales*, Judgment thereupon ſhall " not be ſtayed or reverſed by Reaſon of the Omiſſion of the Words " *Vi et Armis*; provided the Cauſe has been tried by a Jury of the proper " County or Place where the Action is laid: But ſuch Omiſſion ſhall be " amended."

Bro. Treſp. pl. 115. pl. 371.

28. The Venue in an Action of Treſpaſs may be laid in a Hamlet.

Sid. 225. Sippora *v.* Baſſet.

29. It is in the general true, that the Injury, for which an Action of Treſpaſs is brought, muſt be ſpecially alledged in the Declaration.

Sid. 225. Sippora *v.* Baſſet. Cro. Ja. 534.

30. But if the Injury ariſe *ex turpi Cauſa*, as from the debauching of a Man's Daughter, it is not neceſſary to alledge this ſpecially; becauſe the doing thereof would introduce Obſcenity into the Record.

Fitz. N. B. 86. Dyer 306.

31. It is laid down in two Books, that the Declaration in an Action of Treſpaſs, for taking or injuring a Beaſt or Fowl *Feræ Naturæ*, muſt ſhew, that the Beaſt or Fowl was reclaimed; for unleſs it were reclaimed, there could be no Property therein.

Cro. Car. 18. Vincent *v.* Leney, Mich. 1 Car. 1.

32. But it has been holden in one Caſe, that although it be neceſſary to ſhew this in an Action of *Trover* for the Beaſt or Fowl, it is not neceſſary to do it in an Action of Treſpaſs.

Lutw. 1359. Atkinſon *v.* Hunter, Paſch. 3 Ja. 2.

33. The former however ſeems to be the better Opinion; for in a ſubſequent Caſe it is laid down, that if an Action of Treſpaſs be brought for killing a Deer, it muſt appear in the Declaration, that the Defendant knew the Deer to be tame.

Ld. Raym. 608. Maſon *v.* Keeling. 12 Mod. 335. 1 Freem. 534.

34. It muſt be alledged in the Declaration in an Action of Treſpaſs, for an Injury done by a Bite of the Defendant's Dog, that the Defendant knew the Dog was accuſtomed to bite: Becauſe a Dog is not by Nature a fierce or dangerous Animal.

Lutw. 90. Bayntine *v.* Sharp. Salk. 662. Ld. Raym. 110, 1583.

35. For the ſame Reaſon, if this Action be brought for an Injury done by a Goring of the Defendant's Bull, it muſt be alledged in the Declaration, that the Defendant knew the Bull had before gored ſome Perſon.

1 Freem. 434.

Ld. Raym. 1583. Rex *v.* Huggins. 12 Mod. 335.

36. But if this Action be brought for an Injury done by a Beaſt belonging to the Defendant, which is by Nature fierce or dangerous, as a Tyger or Lion, it is not neceſſary to alledge, that the Defendant knew the Beaſt had before hurt ſome Perſon: Becauſe the Owner muſt at his Peril keep a Beaſt of this Kind confined.

Sid. 184. Glaſſcock *v.* Morgan.

37. It is laid down, that if it appear upon the Face of the Declaration in an Action of Treſpaſs, for taking or injuring Goods, that the Goods were in the Poſſeſſion of the Plaintiff, this is ſufficient, although it be not expreſsly alledged that they were in his Poſſeſſion.

2 Lev. 20, 156. Cro. Ja. 46.

38. It has in divers Caſes been holden, that it muſt be expreſsly alledged in the Declaration in an Action of Treſpaſs, for taking or injuring Goods, that the Plaintiff had a Property in the Goods.

2 Show. 395. Dannel *v.* Collingwell.

39. The Declaration in this Action charged the taking of the Beaſt of the Plaintiff, *viz.* one Horſe and one Hat. The Judgment was arreſted: Becauſe it was not alledged, that the Property in the Hat was in the Plaintiff.

40. The

40. The Declaration in this Action charged the breaking of the Plaintiff's Close, and taking of two Horses there being, and a hundred Bushels of Oats of the Goods of the Plaintiff there also being. This Declaration was holden to be bad: Because as one Sentence thereof is closed by the Words *there being*, the Words of the proper Goods of the Plaintiff in the following, notwithstanding the two Sentences are connected by the Copulative *and*, do not extend to the two Horses. Salk. 640. Joce v. Mills.

41. The Declaration in this Action, which charged the breaking of the Plaintiff's Close, and the taking of several Loads of Corn there being, was holden to be insufficient: Because it is not expressly alledged, that the Corn was the Corn of the Plaintiff. 1 Ventr. 278. Holland v. Ellis. 2 Lev. 156.

42. But it is in another Case said, that the Judgment in the Case of *Holland* v. *Ellis* was arrested merely upon the Authority of the Precedents; for that *Hale* Ch. J. said, that if it had been a new Case, he should have been of a contrary Opinion; for that as the Close was alledged to be the Property of the Plaintiff, it ought *prima facie* to have been intended, that the Corn there being was his also. Ld. Raym. 239. Fontleroy v. Aylmer.

43. And in the latter Case, wherein the Declaration charged a Fishing in the Plaintiff's several Fishery, and the Taking of Fish, the Court inclined strongly to be of Opinion, for the Reason given by *Hale* Ch. J. in the Case of *Holland* v. *Ellis*, that the Declaration was good, although it was not expressly alledged, that the Fish were the Fish of the Plaintiff: For that this ought to be intended. Ibid.

44. If an Action of Trespass be brought in the Court of Common Pleas, for taking or injuring Goods, it is not necessary to alledge in the Count, that the Goods were the Property of the Plaintiff, provided this be alledged in the Writ; for the Writ is in this Court Part of the Declaration. 1 Sid. 187. Jones v. Pritchard. Lutw. 1510.

45. It has been holden, that if some of the Goods, charged in the Declaration in an Action of Trespass to have been taken or injured, are alledged to be the Property of the Plaintiff, and others are not, and there be a Verdict for the Plaintiff, he may enter a *Remittitur* as to those Goods which are not alledged to be his, and have Judgment as to the Residue. 2 Saund. 379. Pinkney's Case. Raym. 395. Cutforthay v. Taylor.

46. It is not necessary for the Plaintiff in an Action of Trespass to shew in his Declaration, by what Means his Property in the Goods charged to have been taken or injured was acquired. 2 Bulstr. 288. Willamore v. Bamford.

47. The Quality and Quantity of the personal Chattel, charged to have been taken or injured, must be shewn in the Declaration in an Action of Trespass with convenient Certainty; otherwise the Defendant cannot plead a Recovery in a former Action, in Case a second Action be brought for taking or injuring the same Chattel. 5 Rep. 34. Playter's Case. 2 Inst. 435. 1 Ventr. 53. Salk. 628. Ld. Raym. 1410. Str. 637.

48 The Declaration in an Action of Trespass, which only charged the taking of Cattle, was holden to be bad: Because it did not shew of what Species the Cattle were. 2 Lutw. 1374. Dale v. Phillipson.

49. But the Declaration in this Action for taking a Hawk was, although it did not mention the particular Kind of Hawk, holden to be certain enough. Cro. Car. 18. Vincent v. Lesney.

50. It was holden, that the Declaration in an Action of Trespass for taking a Parcel of Yarn was bad; because the Quantity of Yarn was not shewn. 2 Lev. 195. Wade v. Hatcher.

51. The Plaintiff in an Action of Trespass declared for breaking his Close, and digging and carrying away two Acres of his Land. The Declaration was holden to be bad; because, although it shew the Extent of the Land in which the digging was, it does not shew the Quantity of the Soil which was dug and carried away. 2 Ventr. 174. Highway v. Derby.

Gilb. Hiſt. C. P. 122. 52. But if the Declaration in this Action charge, that the Defendant's Beaſt broke the Cloſe, and eat the Peas of the Plaintiff, this is ſufficient: it being in ſuch Caſe almoſt impoſſible to ſhew the Quantity of the Peas eaten.

Salk. 643. Layton v. Grindall. 53. The Plaintiff in an Action of Treſpaſs declared for breaking and entering his Houſe, and taking ſeveral Keys belonging to the Locks upon the Doors of the Houſe. It was inſiſted, that the Declaration, which did not ſhew either the Kind or Number of the Keys, was bad: But it was holden to be good. And by the Court—The Keys are ſufficiently aſcertained by the Reference to the Locks upon the Doors of the Houſe.

Cro. Ja. 435. Johns v. Wilſon. 54. The Declaration in an Action of Treſpaſs charged the Breaking of the Plaintiff's Cloſe, and the Cutting down of his Thorns to a certain Value. At firſt the Court inclined to be of Opinion that this Declaration was bad; becauſe it did not ſhew the Quantity of the Thorns: But afterwards, upon looking into Precedents, Judgment was given for the Plaintiff.

2 Barn. 222. Hobs v. Green. 55. The Declaration in an Action of Treſpaſs charged the Breaking and Entering of the Plaintiff's Houſe, and the carrying away of divers Quantities of China-ware, Earthen-ware, and Linen, without ſetting forth the particular Quantity of China-ware, Earthen-ware, or Linen; on a Motion in Arreſt of Judgment, this Declaration was holden to be certain enough.

1 Bulſtr. 47. Pollard v. Caſy. Hard. 407. Yelv. 7. 56. It is not neceſſary to ſhew in the Declaration in an Action of Treſpaſs, brought againſt a Stranger for obſtructing a Way claimed by the Plaintiff over the Ground of *J. N.* a Title to the Way; becauſe, as the Claim is only of an Eaſement, it is ſufficient as againſt a Stranger to ſhew a Poſſeſſion thereof.

Str. 6. Vernon v. Goodrick. 57. But if an Action be brought againſt *J. N.* for obſtructing a Way claimed by the Plaintiff over the Ground of *J. N.* the Plaintiff muſt ſhew in his Declaration a Title to the Way; for, although it be ſufficient to alledge the Poſſeſſion of an Eaſement in ſuch Action againſt a Stranger, this is not ſufficient in an Action againſt the Owner of the Ground.

Hard. 407. Yelv. 7. 58. If an Action of Treſpaſs be brought againſt a Stranger, for obſtructing the Plaintiff in the Enjoyment of a Right of Common claimed in the Ground of *J. N.* the Declaration muſt ſhew a Title to the Common: Inaſmuch as the Claim in this Caſe is of an Intereſt in the Ground of another.

Cro. Ja. 129. Wood v. Smith, Mich. 4 Ja. 1. 59. It was in one Caſe doubted, whether, as only Damages can be recovered in an Action of Treſpaſs, it be neceſſary to ſhew in the Declaration the Value of the Thing, for the taking or injuring of which the Action is brought.

Sid. 39. Uſher v. Buſhell. Hil. 12 Car. 2. 60. But it is in two ſubſequent Caſes laid down, that it is neceſſary to ſhew this in the Declaration in this Action.

2 Lev. 230. Strode v. Hunt, Trin. 30 Car. 2.

Cro. Ja. 129. Wood v. Smith. Hil. 4 Ja. 1. 61. It was doubted in one Caſe, whether the Want of having ſhewn in the Declaration in an Action of Treſpaſs the Value of the Thing, for the taking or injuring of which it is brought, be after a Verdict cured by the Statute of the 18 *Eliz. c.* 4.

Sid. 39. Uſher v. Buſhell. Hil. 12 Car. 2. 62. But it was holden in a ſubſequent Caſe, that the Omiſſion of having ſhewn this in the Declaration is, after a Verdict, cured by that Statute.

63. It is in the general true, that it muſt be alledged in the Declaration in an Action of Treſpaſs, that the Injury was to the Damage of the Plaintiff.

64. But

64. But if Churchwardens bring an Action of Treſpaſs for taking or injuring Goods belonging to their Pariſh, they have an Election to alledge, that the Injury was to the Damage of themſelves, or that it was to the Damage of the Pariſhioners. Cro. Eliz. 197. Hammand v. Green.

65. The Plaintiff in an Action of Treſpaſs declared for breaking his Cloſe, and beating his Servant. A general Verdict being found and entire Damages aſſeſſed, it was upon a Motion in Arreſt of Judgment inſiſted, that the Declaration is bad; becauſe the Plaintiff has not ſhewn any ſpecial Damage received from the beating of the Servant: But Judgment was given for the Plaintiff. And by the Court—Although the Plaintiff cannot recover for the perſonal Injury done to the Servant, yet the alledging of this, which may be well done in Aggravation of Damages, ſhall not prevent his recovering for the breaking of his Cloſe. Salk. 643. Newman v. Smith.

66. But in another Caſe it is laid down, that, unleſs the Damages are in ſuch Caſe aſſeſſed for the breaking of the Cloſe only, the Declaration is bad even after a Verdict: Becauſe it ſhall be intended, that the Jury aſſeſſed Damages for the beating of the Servant. 10 Rep. 130. Oſborn's Caſe.

67. And in the latter Caſe, the Caſe of *Pole* v. *Gardiner*, in which the ſame had been laid down as is laid down in the Caſe of *Newman* v. *Smith*, is expreſsly denied to be Law. Ibid.

68. Wherever a Defect of Allegation in the Declaration in an Action of Treſpaſs is ſupplied by the Plea, the Defect is thereby cured.

69. The Plaintiff in an Action of Treſpaſs declared for taking a Hook, but he did not allege it to be his Hook, or that it was in his Poſſeſſion. The Defendant in one Plea juſtified the taking of the Hook out of the Plaintiff's Hand. Upon a Motion in Arreſt of Judgment it was holden, that the Defect of Allegation in the Declaration would have been fatal, if the Defendant had only pleaded Not guilty; but that, as it appears from one Plea that the Defendant took the Hook out of the Plaintiff's Poſſeſſion, the Defect is not fatal. Sid. 184. Glaſſcock v. Morgan.

70. The Declaration in an Action of Treſpaſs charged the taking of *quatuor Pullos*, but it did not ſay *Pullos Equinos*, or add an *Anglice*, Colts. It was holden, that the Want of Certainty in this Declaration was made good by one of the Defendant's Pleas, wherein he juſtified the taking of four Colts. Lutw. 1492.

a. Of declaring with a *Continuando*.

71. If a Treſpaſs be continued without Intermiſſion for a longer Time than the Space of one Day, or if the Treſpaſs be repeated on a ſubſequent Day, the Party injured may recover in one Action of Treſpaſs for the firſt Treſpaſs, and in another for the Continuance or Repetition thereof. Dyer 320. Moor v. Brown.

72. But the Party injured is not under a Neceſſity of bringing two Actions in either Caſe: For he may in one Action, by declaring with a *Continuando*, recover a Satisfaction for the firſt Treſpaſs, and alſo for the Continuance or Repetition thereof. 2 Roll. Abr. 545. A. pl. 1.

73. There are two Ways of declaring in an Action of Treſpaſs with a *Continuando*.

74. In one of theſe the Plaintiff declares with a *Continuando* for the whole Time, from the Day on which the firſt Treſpaſs is charged until a ſubſequent Day mentioned in the Declaration. Co. Entr. 661.

75. This Way of declaring is proper, in any Caſe wherein the Treſpaſs may have been continued without Intermiſſion, for a longer Time than the Space of one Day. Fitz. N. B. 91. Co. Entr. 661. Bro. Treſp. pl. 374.

76. In

Co. Entr. 648, 658. 76. In the other the Plaintiff declares with a *Continuando* on divers Days and at divers Times, from the Day on which the firſt Treſpaſs is charged until a ſubſequent Day mentioned in the Declaration.

Ld. Raym. 240. Fontleroy *v.* Aylmer. Ibid. 824, 976. 77. This Way of declaring is proper, in any Caſe wherein there may have been a Repetition of the Treſpaſs upon a Day ſubſequent to the Day on which the firſt Treſpaſs is charged, or where Part of the Treſpaſs may have been committed upon one Day and Part upon another.

Bro. Treſp. pl. 149. Sir Tho. Raym. 396.

Salk. 638, 639. Monkton *v.* Paſhley. 78. If the Nature of a Treſpaſs be ſuch, that it cannot have been continued or repeated, the Plaintiff in an Action of Treſpaſs cannot declare with a *Continuando*.

Bro. Treſp. pl. 441. 1 Lev. 210. 79. If this Action be brought for taking a Horſe, the Plaintiff cannot declare with a *Continuando:* Becauſe there cannot have been either a Continuance or a Repetition of the Treſpaſs.

Bro. Treſp. pl. 441. 2 Roll. Abr. 549. I. pl. 5. 80. It is laid down, that the Plaintiff in an Action of Treſpaſs cannot declare with a *Continuando* for cutting down ten Trees; becauſe the Treſpaſs cannot have been continued or repeated.

Bro. Treſp. pl. 374. pl. 441. 81. It is laid down in one Book, that the Plaintiff in an Action of Treſpaſs cannot declare with a *Continuando* for breaking his Houſe; becauſe the Whole of the Treſpaſs muſt have been committed at the ſame Time.

Fitz. N. B. 91. 82. But it is in another Book laid down, that the Plaintiff in this Action may declare with a *Continuando* for breaking his Houſe.

Ld. Raym. 975. Monkton *v* Paſhley. Salk. 638. S. C. 83. For the Sake of reconciling theſe two Books this Diſtinction was taken in one Caſe; namely, That where the firſt breaking of the Houſe was followed with an Ouſter, the Party injured may declare in an Action of Treſpaſs with a *Continuando*; becauſe by the Ouſter the Treſpaſs is continued: But that where the firſt breaking was not followed with an Ouſter, the Party injured cannot declare in this Action with a *Continuando*; becauſe every ſubſequent breaking of the Houſe is a new Treſpaſs, and not a Continuance or Repetition of a former Treſpaſs. And in Support of this Diſtinction it was ſaid, that a Releaſe of a Treſpaſs, which was followed with an Ouſter, is a Releaſe of all Treſpaſſes on the Premiſſes during the Continuance of the Ouſter: But that a Releaſe of a Treſpaſs, which was not followed with an Ouſter, is not a Releaſe of a Treſpaſs on the Premiſſes ſubſequent to the Ouſter. But the Court was not ſatisfied with the Diſtinction; and it was ſaid by *Powel* J. that a *Continuando* in pleading does not always mean a Continuance without Intermiſſion.

Ld. Raym. 240. Fontleroy *v.* Aylmer. 84. It is in another Caſe ſaid, that what is laid down in *Brooke* and *Fitzherbert* may be reconciled, by ſuppoſing, that by the breaking of the Houſe in the Caſes in *Brooke* a total breaking or throwing down thereof is to be intended; for which, as the Treſpaſs cannot have been continued or repeated, a Declaration with a *Continuando* would be bad: But that by the breaking of the Houſe in the Caſe in *Fitzherbert* a partial and repeated breaking thereof is to be intended, for which a Declaration with a *Continuando* would be good.

Bro. Treſp. pl. 149. 2 Roll. Abr. 549. I. pl. 6. pl. 7. 85. It is laid down in two Books, that although the Declaration in an Action of Treſpaſs for the taking of two Loads of Wheat and five Loads of Barley, with a *Continuando* for the whole Time, from the Day on which the firſt Treſpaſs is charged until a ſubſequent Day mentioned in the Declaration be

be not good, a Declaration with a *Continuando* on divers Days and at divers Times, from the Day on which the firſt Treſpaſs is charged till a ſubſequent Day mentioned in the Declaration, is good.

86. It is in another Book laid down, that a Declaration for the breaking of a Houſe, with a *Continuando* on divers Days and at divers Times, from the Day on which the firſt Treſpaſs is charged till a ſubſequent Day mentioned in the Declaration, is good: Becauſe Part of the Houſe may have been broken upon one Day and Part upon a ſubſequent Day. Ld. Raym. 240. Fontleroy v. Alymer.

87. In another Book it is ſaid, that in an Action of Treſpaſs for cutting down ſeveral Acres of Wood a Declaration with a *Continuando* is good. Sid. 319.

88. The Declaration in an Action of Treſpaſs charged the taking of ten Loads of Wheat, ten Loads of Barley, and ten Loads of Oats, on the firſt Day of *April*, with a *Continuando* on divers Days and at divers Times, from the ſaid firſt Day of *April* until the firſt Day of *June*. Upon a Writ of Error in this Caſe it was aſſigned for Error, that the Declaration ought not to have been with a *Continuando*; becauſe, it being alledged that all the Corn was taken on the firſt Day of *April*, none of it could have been taken upon a ſubſequent Day. The Judgment was affirmed. And by the Court —Where from the Nature of the Treſpaſs, as if it be the taking of a Horſe, the whole of it muſt have been committed at once, a Declaration with a *Continuando* would be ill: But where from the Nature of the Treſpaſs, Part of it may have been committed upon one Day, and Part upon another, it ſhall be intended, in Support of a Declaration which charges the Treſpaſs with a *Continuando*, notwithſtanding it be alledged that the whole Treſpaſs was committed upon the Day firſt mentioned in the Declaration, that Part thereof was committed upon another Day. 1 Lev. 210. Butler v. Hedges, Paſch. 19 Car. 2.

89. It is indeed ſaid to have been holden in the Caſe of *Ovel* v. *Langden*, which was ſubſequent to the Caſe of *Butler* v. *Hedges*, that in an Action of Treſpaſs for taking Oyſters, the Declaration with a *Continuando* upon divers Days and at divers Times was bad; for that every Taking upon any Day ſubſequent to the Day firſt mentioned in the Declaration was a new Treſpaſs, and not a Continuance of the firſt Treſpaſs. Ld. Raym. 239.

90. But the Book from which this Caſe is cited, the Name of which appears to be *Hovel* v. *Reynolds*, is quite ſilent as to this Point. 2 Jon. 109. Hovel v. Reynolds, Trin. 30 Car. 2.

91. Another Book, in which this Caſe is reported, is alſo quite ſilent as to this Point. 1 Ventr. 329.

92. And in another Report of the ſame Caſe it is ſaid, that the Declaration was as to this Point holden to be good. 2 Show. 196.

93. The Plaintiff in an Action of Treſpaſs declared for the breaking of his Cloſe, with a *Continuando* for the whole Time, from the Day on which the firſt Treſpaſs was charged until the Day of exhibiting the Bill; but it was not ſhewn on what Day the Bill was exhibited. *Dodderidge* J. was of Opinion, that the Declaration was bad, even after a Verdict, for Want of ſhewing this; and it was ſaid, that the conſtant Practice is, to alledge the Continuance of the Treſpaſs to a Day certain. 2 Roll. Rep. 135. Sliford v. Goodrick. 5 Rep. 35.

94. If in the Declaration in an Action of Treſpaſs, the Treſpaſs be laid with a *Continuando* on divers Days and at divers Times, the particular Days on which the Treſpaſs was repeated need not be ſhewn. Jenk. Cent. 124. pl. 52.

95. If in an Action of Treſpaſs the Declaration charge a Treſpaſs of which there cannot have been Continuance, with a *Continuando*, the Declaration is bad. 1 Lev. 210. Butler v. Hedges. Salk. 639.

96. If

3 Lev. 94. Gillam v. Clayton. Salk. 639. Sid. 375. 2 Show. 196.

96. If in the Declaration in an Action of Treſpaſs two Treſpaſſes are laid with a *Continuando*, whereas only one of them could have been continued, the Declaration, although entire Damages have been aſſeſſed, is good after a Verdict; for it ſhall be intended, that the Damages, which are aſſeſſed for the Continuance, are aſſeſſed for the Continuance of that Treſpaſs which might have been continued.

3. Of the Plea.

1. Of pleading in Abatement.

Bro. Treſp. pl. 190. 9 Ed. 4. 51.

97. In an Action of Treſpaſs, brought by Baron and Feme for the Battery of both of them, Damages to the Amount of ten Pounds were aſſeſſed for the Battery of the Baron, and Damages to the Amount of forty Shillings for the Battery of the Feme. It was holden, that, as the Wife could not join with her Huſband in an Action for the Battery of him, the Writ did abate as to that Part; but that it was good as to the Battery of the Wife, for which the Huſband and Wife had a joint Right of Action.

Bro. Treſp. pl. 190.

98. It is laid down that if *J. S.* who has no Right of Action, have joined in a Writ of Treſpaſs with *J. N.* in whom there is a Right of Action, the Writ does *ipſo facto* abate.

Cro. Eliz. 143. Hare and others v. Celey, Trin. 31 Eliz.

99. *Hare* and three others having joined in a Writ of Treſpaſs *Quare Clauſum fregit*, it was found ſpecially by the Jury, that only *Hare* had an Intereſt in the Land to which the Injury was done. It was holden, that the Writ did *ipſo facto* abate.

Cro. Eliz. 554. Deering v. Moor, Paſch. 39 Eliz.

100. But in another Caſe, a few Years ſubſequent to the Caſe of *Hare and others* v. *Celey*, it was holden, that the Writ is in ſuch Caſe only abateable. In an Action of Treſpaſs the Jury found that two others were Tenants in Common with the Plaintiff. It was holden, that the Plaintiff was intitled to Judgment. And by the Court—As the Defendant has omitted to plead in Abatement, that the Plaintiff is Tenant in Common with two others who are not named in the Writ, he cannot now avail himſelf of the finding of the Jury.

Bro. Treſp. pl. 15. pl. 239 pl. 371.

101. It is not a good Plea in Abatement of an Action of Treſpaſs, that *A.* the Place in which the *Venue* is laid, is a Hamlet belonging to the Pariſh of *B.* for the *Venue* may be laid in a Hamlet.

Bro. Treſp. pl. 14.

102. It is in one Caſe laid down, that if the *Venue* in an Action of Treſpaſs be laid in *A.* in the County of *B.* without any Addition; and there are two Vills of the Name of *A.* in the County, one of which is called *A. over*, and the other *A. nether*; and there be no Vill in the County of the Name of *A.* without Addition, this cannot be pleaded in Abatement.

Bro. Treſp. pl. 94. pl. 299.

103. But in two other Caſes in the ſame Book it is laid down, that it may in this Caſe be pleaded in Abatement of the Action, that there are two Vills of the Name of *A.* in the County of *B.* one of which is called *A. over*, the other *A. nether*; and that there is no Vill in the County of the Name of *A.* without Addition; *Abſque hoc*, that there is any Vill, Hamlet or known Place out of a Vill or Hamlet, called *A.* only, in the County of *B.*

104. And

104. And the latter ſeems to be the better Opinion; for in another Caſe in the ſame Book it is laid down, that no ſuch Vill in the County, as that in which the *Venue* is laid, is a good Plea in Abatement of an Action. Bro. Treſp. pl. 19.

105. The Pendency of a former Action cannot be pleaded in Abatement of a ſecond Action of Treſpaſs, until the Plaintiff has declared in both Actions: Becauſe, as the Writ of Treſpaſs is general, it cannot be known, until the Cauſe of Action is aſcertained in both Actions by the Declarations, that the ſecond Action is brought for the ſame Cauſe as the firſt. 5 Rep. 61. Sparrie's Caſe.

106. And for the ſame Reaſon, the Defendant cannot plead in Abatement of an Action of Treſpaſs for taking Goods, that there is an Action of Replevin depending for the Taking of the ſame Goods, until the Plaintiff has declared in both Actions. Ibid.

2. Of pleading in Chief.

1. The General Iſſue.

107. The General Iſſue is a proper Plea for the Defendant in an Action of Treſpaſs, in Caſe the Plaintiff had no Property in the perſonal Chattel, for the Taking or Injuring of which the Action is brought: Becauſe, unleſs it be proved that the Plaintiff had either a general or ſpecial Property in the Chattel, he is not intitled to recover. Bro. Treſp. pl. 34. pl. 382.

108. But it is not always proper for the Defendant in an Action of Treſpaſs for Breaking the Plaintiff's Cloſe to plead the General Iſſue, although the Freehold of the Cloſe were in the Defendant. For in ſome Caſes the Perſon, who is in the Poſſeſſion of a Cloſe, may recover in this Action againſt the Perſon in whom the Freehold is. Bro. Treſp. pl. 273. pl. 361. Dyer 285.

2. A Special Plea.

109. The Defendant in an Action of Treſpaſs cannot plead any Matter ſpecially, which amounts to the General Iſſue.

110. In the Declaration in an Action of Treſpaſs it was alledged, that the Treſpaſs was committed at *A.* in the County of *B.* The Defendant juſtified the Act complained of at *C.* in the County of *D.* and traverſed the having done it at *A.* in the County of *B.* It was ordered that the General Iſſue ſhould be entered: Becauſe the Plea amounted thereto. And by the Court—The Defendant ought to have pleaded the General Iſſue; for the Jury cannot, as the Treſpaſs charged is local, find him Guilty, unleſs it be proved that he committed it at *A.* in the County, of *B.* Bro. Trav. pl. 14. Bro. Treſp. pl. 19. Bro. Attaint. pl. 104.

111. The Defendant in an Action of Treſpaſs pleaded, that the perſonal Chattel, for the Taking of which it was brought, was not the Property of the Plaintiff. The General Iſſue was ordered to be entered; becauſe this Plea amounted thereto. Bro. Treſp. pl 34.

112. But it has been holden, that the Gift of a perſonal Chattel may be pleaded in an Action of Treſpaſs for the Taking thereof: For that this, although it be a Denial of the Plaintiff's Property, does not amount to the General Iſſue. Bro. Treſp. pl. 27.

113. If

Bro. Trav. pl. 378. 113. If an Action of Treſpaſs be brought by *J. S.* for the beating of *J. N.* his Servant, by Reaſon whereof he loſt the Service of *J. N.* the Defendant cannot plead that *J. S.* did not loſe the Service of *J. N.* becauſe, as *J. S.* cannot recover unleſs the Loſs of Service be proved, this Plea amounts to the General Iſſue.

Bro. Treſp. pl. 34. pl. 326. 114. But the Defendant in ſuch Action may plead, that *J. N.* was not the Servant of *J. S.* at the Time of the Beating; for this Plea does not amount to the General Iſſue.

3 Lev. 41. Thomas *v.* Nichols. 115. If one Matter, which amounts to the General Iſſue, be joined in the ſame Plea with another Matter which amounts only to a Juſtification, the Plea is good.

116. The Books are not agreed, as to what is proper to be done by the Plaintiff, where the Matter ſpecially pleaded by the Defendant in an Action of Treſpaſs amounts to the General Iſſue.

Hob. 127. 1 Leon. 178. Cro. Ja. 165. 117. In ſome of them it is laid down, that the Plaintiff cannot in this Caſe demur: But that he ought to move the Court, that the General Iſſue, or a *Nil dicit*, may be entered.

10 Rep. 95. Cro. Eliz. 146, 319. Cro. Ja. 319. Cro. Car. 157. 118. In others it is laid down, that a ſpecial Plea, where the Matter ſpecially pleaded amounts to the General Iſſue, would, it being defective in Form, before the Statute made in the Twenty-ſeventh Year of the Reign of Queen *Elizabeth* have been bad upon a general Demurrer, and that it is ſo at this Day upon a ſpecial Demurrer.

1 Sid. 106. 119. As it has been already ſhewn, in treating of the Injuries for which an Action of Treſpaſs lies, in what Caſes this Action does not lie, for an Act which is in the general a Treſpaſs, on the Account of ſome particular Circumſtance attending the Act. It is in this Place ſufficient to ſay, if any Circumſtance make an Act, which is in the general a Treſpaſs, lawful or excuſable, this may be pleaded ſpecially in an Action of Treſpaſs.

Hob. 134. Weaver *v.* Ward. 120. If the Circumſtance, which is ſpecially pleaded, in an Action of Treſpaſs, make the Act complained of lawful, it is proper to plead this Circumſtance in Juſtification; and it is not in this Caſe neceſſary for the Defendant to ſhew, that the Act complained of was not done voluntarily; for a Plea in Juſtification is not founded upon a Suppoſition, that the Act was accidental.

Ibid. 121. If the Circumſtance, which is ſpecially pleaded in an Action of Treſpaſs, do not make the Act complained of lawful, and do only make it excuſable, it is proper to plead this Circumſtance in Excuſe; and it is in this Caſe neceſſary for the Defendant to ſhew not only that the Act complained of was accidental, but likewiſe that it was not owing to Neglect, or want of due Caution.

Ibid. 122. If, at the Inſtant a Soldier diſcharges his Gun in exerciſing, a Perſon run acroſs and is wounded, the Defendant cannot plead in Juſtification of the Wounding: And if he plead in Excuſe thereof, all the Circumſtances muſt be ſhewn, that the Court may judge, whether the Wounding were owing to Want of due Caution.

Jenk. Cent. 184. pl. 77. 123. If the Defendant in an Action of Treſpaſs plead ſeveral Matters in Juſtification, any one of which is a good Juſtification, the Plea is good, although the others are not ſo.

Str. 509. Phillips *v.* Biron. 1 Saund. 28. 124. If two Defendants in an Action of Treſpaſs join in a Plea of Juſtification, which is a good Juſtification of only one of them, the Plea is bad as to both; for a joint Plea cannot be good as to one Defendant and bad as to the other.

Salk. 638. Gibbon *v.* Papper. 1 Saund. 28. 125. Every ſpecial Plea in an Action of Treſpaſs muſt confeſs, that the Act complained of has been done.

126. It

126. It is in the general true, that if the Plea in an Action of Treſpaſs, which is brought for taking Goods, juſtify the Taking of the Goods, it muſt confeſs that the Property was in the Plaintiff. Salk. 640. Joce *v.* Mills.

127. But if the Defendant in ſuch Action plead in Juſtification, that he took the Goods as a Diſtreſs for Rent in Arrear, it is not neceſſary to confeſs, that the Property in them was in the Plaintiff; for the Goods of any Perſon, if found upon the Premiſſes, may be diſtrained for Rent in Arrear. Ibid.

128. It is laid down, that it is not neceſſary for a Sheriff's Officer, who juſtifies in an Action of Treſpaſs under the Warrant of the Sheriff, to ſhew in what Place the Warrant was iſſued; for that this, if it be made neceſſary by the Replication, may be ſhewn in the Rejoinder. Bro. Faux. Impr. pl. 12.

129. But it is ſaid, that an Officer, who juſtifies in an Action of Treſpaſs under the Warrant of a Juſtice of the Peace, muſt ſhew at what Place the Warrant was iſſued. 1 Roll. Rep. 135. Wilſon *v.* Dodd.

130. If the Perſon, at whoſe Suit a Writ of *Fieri Facias* has iſſued, juſtify in an Action of Treſpaſs under the Writ, he muſt ſhew the Judgment upon which it iſſued; becauſe, if the Judgment were not regular, he is liable to the Action. Carth. 443. Britton *v.* Cole. Str. 509.

131. Every Perſon, who has aſſiſted in the Execution of a Writ of *Fieri Facias*, muſt, if he juſtify in an Action of Treſpaſs under the Writ, unleſs he acted by the Command or at the Requeſt of the Sheriff or his Officer, ſhew the Judgment upon which it is iſſued: For if he acted officiouſly, it was incumbent upon him to take Care that the Judgment was regular. But if a Sheriff or his Officer, or a Perſon acting by the Command or at the Requeſt of the Sheriff or his Officer, juſtify in this Action under a Writ of *Fieri Facias*, it is not neceſſary for either of theſe, to ſhew the Judgment upon which the Writ iſſued: Becauſe the Writ was a ſufficient Juſtification to every one of theſe, although the Judgment were not regular. Carth. 443. Britton *v.* Cole.

132. It is not neceſſary for the Defendant in an Action of Treſpaſs, who juſtifies an Impriſonment under a Capias of an inferior Court, to ſet out all the Proceedings in that Court; or to ſhew that the Cauſe of Action in the inferior Court aroſe within the Juriſdiction of that Court. Sayer 82. Adams *v.* Freeman and Wynne.

133. If one Perſon, who might have juſtified in an Action of Treſpaſs under a Writ, have joined in a Plea of Juſtification with another to whom the Writ was not a Juſtification, the Plea is bad as to both; for a joint Plea cannot be good as to one Defendant, and bad as to the other. Str. 509. Phillips *v.* Biron. 1 Saund. 28.

134. If the Defendant in an Action of Treſpaſs juſtify under a Preſcription to dig Stones for certain Repairs, he muſt ſhew that the Stones dug were uſed for ſuch Repairs. 3 Lev. 323. Danby *v.* Hodgſon.

135. If *J. S.* juſtify in an Action of Treſpaſs, the breaking down of a Gate erected in the Yard of *J. N.* through which he had a Right of Paſſage, he muſt ſhew that the Gate was locked, or otherwiſe faſtened, ſo as to make the Breaking neceſſary. 3 Lev. 92. Sprigg *v.* Neal.

136. The Declaration in an Action of Treſpaſs charged the chaſing of a Beaſt *ita Quod* it died of the Chaſing. The Defendant juſtified the Chaſing: But gave no Anſwer as to the Dying of the Beaſt. This Plea was holden to be bad. Cro. Eliz. 384. Hill *v.* Prideaux. Paſch. 37. Eliz.

137. In two ſubſequent Caſes a contrary Doctrine is laid down. In one of theſe, this Caſe is denied to be Law; and it is in both of them laid down generally, that it is not neceſſary for a Defendant to give any Anſwer to what is alledged under an *ita Quod*, or a *per Quod*; becauſe this is only alledged in Aggravation of Damages. 1 Lev. 283. Leech *v.* Midgley, Hil. 21 Car. 1. Salk. 459. Lodie *v.* Arnold, Mich. 9 W. 3.

138. If

Bro. Treſp. pl. 69. Bro. Accord, pl. 3. pl. 6. 138. If an Award be pleaded in an Action of Treſpaſs, with a *Proteſtando* that the Defendant is ready to perform it, this is a good Plea; for, as an Action of Debt will lie upon the Award, it is not neceſſary to ſhew that it has been performed.

Bro. Accord, pl. 6. 139. But if an Accord with Satisfaction be pleaded in this Action, the Defendant muſt ſhew, that the Satisfaction has been made: This being the material Part of his Defence.

9 Rep. 79. Peyton's Caſe. Bro. Accord, pl. 6. pl. 7. 140. It is not ſufficient for the Defendant in an Action of Treſpaſs, who has pleaded an Accord with Satisfaction, to ſhew that the Money, which by the Accord was to have been paid, has been tendered to the Plaintiff: Becauſe unleſs the Money has been in Fact paid, the Plaintiff cannot be ſaid to be ſatisfied.

Dyer 326. Fitz. Accord, pl. 3. pl. 4. 141. It is no Plea in an Action of Treſpaſs, that it was agreed between the Plaintiff and the Defendant, that the Goods which the latter had taken from the former ſhould be reſtored, and that they were reſtored: For by the Reſtoration of the Goods no Satisfaction was made for the Tort in taking them.

Bro. Accord, pl. 1. Fitz. Accord, pl. 3. pl. 4. Dyer 356. 142. It muſt appear, that the Satisfaction, which is pleaded in an Action of Treſpaſs, was not only beneficial to the Plaintiff, but that the making thereof was attended with ſome Expence to the Defendant.

Fitz Accord, pl. 1. 143. It is not a good Plea in an Action of Treſpaſs, that it was agreed between the Plaintiff and the Defendant, that the latter ſhould, as a Satisfaction for the Treſpaſs, make up a Difference between the Plaintiff and *J. S.* and that the Defendant did make it up; unleſs it be ſhewn, that the making of this up was attended with ſome Expence to the Defendant.

2 Roll. Abr. 569. R. pl. 1. 144. A Satisfaction, although there have been no Accord, may be pleaded in an Action of Treſpaſs: But it muſt be ſhewn, that the Plaintiff accepted of the Satisfaction.

Bro. Accord, pl. 8. 145. It is a good Plea in this Action, that the Defendant gave the Plaintiff a Bottle of Wine as a Satisfaction, and that the Plaintiff accepted thereof as a Satisfaction, although there have been no Accord.

Bro. Bar. pl. 22. 9 Rep. 80. 146. A Satisfaction, although it were made in Conſequence of an Accord, may be pleaded in an Action of Treſpaſs without pleading the Accord; for the Satisfaction is the material Thing.

Bro. Trav. pl. 179. 147. And it is a much ſafer Way, although there have been an Accord, to plead the Satisfaction without the Accord; for if the Accord be pleaded, this, although it were not neceſſary to have been pleaded, becomes material; And conſequently the Plaintiff has an Election to traverſe either the Accord, or the Satisfaction.

Bro. Bar. pl. 22. 9 Rep. 80. 148. The Pleading of an Accord does moreover lay the Defendant under a Difficulty: For if this be pleaded, every Circumſtance, which attended the Making thereof, muſt be ſhewn with great Preciſion.

Shep. Abr. 1043. 149. If three have been Parties to a Treſpaſs, and one of them have made a Satisfaction, the other two may plead this in Bar of an Action for the Treſpaſs.

2 Roll. Abr. 569. R. pl. 1. 150. If a Man be amerced in the Lord's Court for a Treſpaſs done to the Lord, and the Money amerced be paid or levied, and received by the Lord, the Payment or Levying of the Money and the Receipt thereof may, although the Amercement were illegal, be pleaded in Satisfaction, in Caſe an Action of Treſpaſs be brought.

Cro. Eliz. 245. Taylor *v.* Fiſher. Bro. Treſp. pl. 295. 151. If a Licence be pleaded in an Action of Treſpaſs, it muſt be ſhewn, that this was granted by a Perſon having Power to grant it.

152. An

152. An Action of Treſpaſs being brought for taking a Gelding, the Defendant pleaded, that for Fear of his Life, which twelve armed Men threatened to take away if he did not do it, he took the Gelding. This was holden to be a bad Plea. And by *Roll* Ch. J.—If a Defendant could in this Manner excuſe himſelf, the injured Party would be without Redreſs; for the Men, who threatened the Defendant, are not liable to make a Satisfaction to the Plaintiff. Sty. 72. Gilbert *v.* Stone.

153. It was heretofore holden, that Never accoupled in lawful Marriage was not a good Plea, in an Action of Treſpaſs for taking away a Wife with the Goods of her Huſband: Becauſe this Action lies, although there has been only a Marriage *De facto*. 2 Roll. Abr. 551. pl. 1.

154. But this Plea would perhaps at this Day be good: For by the 26 *Geo.* 2. *cap.* 33. *par.* 8. it is enacted, "That all Marriages, ſolemnized "in any other Place than a Church or publick Chapel, in which Banns of "Matrimony have been uſually publiſhed, unleſs by Special Licence; "or that ſhall be ſolemnized without Publication of Banns or Licence of "Marriage firſt had and obtained; ſhall be null and void to all Intents and "Purpoſes whatſoever."

155. And by *par.* 11. it is enacted, "That all Marriages ſolemnized by "Licence, where either of the Parties, not being a Widower or Widow, "ſhall be under the Age of twenty-one Years, which ſhall be had without "the Conſent of the Father of ſuch Party, if then living, firſt had and "obtained; or if dead, of the Guardian or Guardians of ſuch Party law-"fully appointed, or one of them, and in Caſe there ſhall be no ſuch Guar-"dian, then of the Mother, if living and unmarried, or if there ſhall be "no Mother living and unmarried, then of the Guardian or Guardians of "the Perſon appointed by the Court of Chancery; ſhall be null and void "to all Intents and Purpoſes whatſoever."

156. If a Releaſe have been given to one Party to a Treſpaſs, any other Party thereto may plead this in Bar of an Action of Treſpaſs: But it muſt be pleaded with a *Profert in Curia*; and there muſt be an Averment, that the Treſpaſs complained of is the ſame that was releaſed. Hob. 66. Cock *v.* Jenour.

157. A Conviction upon a Statute for an Offence may be pleaded in an Action of Treſpaſs for the Offence. Salk. 181.

158. In every Action of Treſpaſs *Quare Clauſum fregit*, the Defendant may plead, that the Place in which the Treſpaſs is charged is his Freehold. Salk. 453. Helvis *v.* Lamb.

159. But if an Action of Treſpaſs be brought for taking a Tree out of a Cloſe, the Defendant cannot plead, that the Place in which the Treſpaſs is charged is his Freehold; for this can only be pleaded to an Action of Treſpaſs *Quare Clauſum fregit*. Carth. 176. Alſtone *v.* Hutchinſon.

160. If an Action of Treſpaſs, brought for breaking a Cloſe and eating Graſs with Cattle, the Defendant plead, that the Cattle eſcaped out of an adjoining Cloſe in his Poſſeſſion, through a Fence in the Poſſeſſion of the Plaintiff, which the Plaintiff ought to have kept in Repair, and which was out of Repair, it is neceſſary for the Defendant to ſhew why the Plaintiff was bound to have kept the Fence in Repairs. Yelv. 75. Faldo *v.* Ridge.

161. If *J. S.* have recovered Land in an Action of Ejectment againſt *J. N.* and afterwards *J. N.* bring an Action of Treſpaſs againſt *J. S.* for an Injury done to the Land, *J. S.* may plead the Recovery in the Action of Ejectment; becauſe the Poſſeſſion of *J. N.* was diveſted by the Recovery in the Action of Ejectment. 3 Leon. 194. Anon.

162. If a Recovery in a former Action be pleaded to a ſecond Action for the ſame Treſpaſs, it is not neceſſary to ſhew, that a Writ of Execution was iſſued upon the Judgment in the firſt Action. Bro. Treſp. pl. 20.

163. If an Action of Treſpaſs be brought for Taking a Horſe, and the Defendant juſtify the taking of it Damage-feaſant in his Cloſe called *A.* it is ſufficient to alledge a Poſſeſſion of the Cloſe in himſelf: For as the Right Cro. Car. 138. Salk. 643. 12 Mod. 37.

Right of Close cannot come in Question, it is not necessaty to shew by what Title he is possessed.

Salk. 643. 12 Mod. 509. 164. But if the Declaration, in an Action of Trespas *Quare Clausum fregit*, charge the Breaking of a Close called *A.* the Defendant, if he justify the Breaking, must shew a Title to the Close: Because as a Close certain is mentioned in the Declaration, the Question depends upon the Right of Close.

2 Saund. 401. Pearl v. Bridges. 1 Ventr. 221. 165. If the Defendant in an Action of Trespas justify the taking of Corn out of a Close in the Possession of the Plaintiff, he must shew a Right to the Corn; for it shall *prima facie* be intended, that it was the Corn of the Plaintiff.

Bro. Tresp. pl. 360. pl. 366. 166. If the Plaintiff in an Action of Trespas *Quare Clausum fregit* have not given a Name to his Close, the Defendant may justify the Act complained of in his Close called *A.* in the Vill where the *Venue* is laid, and there is no Necessity to traverse the having done it in any other Close in that Vill.

Bro. Tresp. pl. 360. pl. 366. pl. 369. 167. But if the Plaintiff in this Action have given a Name to his Close, the Defendant cannot justify the Act complained of in any other Close in the Vill wherein the *Venue* is laid, without traversing the having done it in the Close of the Plaintiff: But it is not necessary to traverse the having done it in any other Vill; because, as the Trespas is local, he cannot be found guilty in any other Vill.

Bro. Tresp. pl. 219. 3 Lev. 219. 168. If an Action of Trespas be brought for a transitory Trespas, and the *Venue* be laid at *A.* in the County of *B.* it is not necessary for the Defendant, provided he justify the Act complained of at *A.* in the County of *B.* to traverse the having done it at any other Place; the Place being agreed.

1 Inst. 282. Cro. Ja. 372. 3 Lev. 113. 2 Saund. 5. 169. The Defendant in an Action of Trespas, in Case the Matter of Justification be transitory, must always justify at the Place in which the *Venue* is laid, although the Matter of Justification arise at another Place: Nor is there any Inconveniency in so doing; for as the Matter of Justification is transitory, he may avail himself thereof, notwithstanding it arise at another Place.

1 Inst. 282. Cro. Eliz. 705. Cro. Ja. 372. 3 Lev. 113. 170. But if the *Venue* in an Action of Trespas be laid at *A.* in the County of *C.* and the Matter of Justification is, that the Defendant did the Act complained of at *B.* in the County of *C.* as Constable thereof, he can only justify at *B.* in the County of *C.* because the Matter of Justification is local; and he must traverse the having done the Act at any other Place.

1 Inst. 282. Bro. Trav. pl. 76 pl. 85. pl. 102. Cro Ja. 372. 171. So if the *Venue* in this Action be laid at *A.* in the County of *B.* and the Matter of Justification is, that the Act complained of was done by the Defendant in the County of *C.* as a Justice of the Peace of this County, the Defendant, as the Matter of Justification is local, can only justify at some Place in the County of *C.* and he must traverse the having done the Act at *A.* in the County of *B.* or at any other Place out of the County of *C.*

2 Saund. 5. Mellor v. Walker. 172. The Defendant, who justifies in an Action of Trespas, ought, unless there be some special Reason to the contrary, to justify upon the Day on which the Act complained of is alledged to have been done.

Bro. Tresp. pl. 219. Cro Car. 228. 2 Saund. 295. 1 Bulst. 138. 1 Freem. 246. 173. And if the Defendant in this Action do justify the Act complained of upon the Day on which it is alledged to have been done, it is not necessary to traverse the Time either before or after; the Day being agreed.

Bro. Tresp. pl. 219. Cro. Car. 228. 1 Bulst. 138. Lutw. 1452. 174. But if the Defendant in this Action justify the Act complained of upon any other Day than that on which it is alledged to have been done, it is necessary to traverse the Time before, or the Time after, or both, as the Case may require.

175. If

175. If the Juſtification be that the Defendant had a Licence to do the Act complained of, the Time antecedent as well as that ſubſequent to the Time of the Licence muſt be traverſed. Bid. 294. 2 Saund. 295.

176. But if the Juſtification be under a Releaſe, it is ſufficient to traverſe the Time ſubſequent to the Releaſe; for by the Releaſe all Treſpaſſes antecedent thereto are diſcharged. Hob. 104. Cro. Eliz. 87.

177. If the Defendant juſtify under a Feoffment, it is only neceſſary to traverſe the Time antecedent to the Feoffment; for it ſhall be intended, unleſs the contrary be ſhewn, that the Freehold continued in him. Hob. 104. Cart. 207.

178. It is laid down in one Caſe, that the Want of traverſing the Time, either before or after the Day upon which the Act complained of is juſtified, is not cured by an Averment that it is the ſame Treſpaſs. 1 Ventr. 184. Smith *v.* Butterfield. Hil. 23 Car. 2. 2 Keb. 878. S. C.

179. But in divers other Caſes, ſome of which are ſubſequent to the Caſe of *Smith* v. *Butterfield*, it is laid down, that the Want of doing this is cured by an Averment that it is the ſame Treſpaſs. 1 Bulſtr. 138. Cro. Car. 228. 2 Jon. 146. 3 Lev. 277. Lutw. 1457.

180. And it is in one of the ſubſequent Caſes laid down, that if the Defendant in an Action of Treſpaſs, who juſtifies the Act complained of, do, after averring that it is the ſame Treſpaſs, add a Traverſe of the Time, either before or after the Day juſtified upon, the Plea is bad upon a ſpecial Demurrer. Lutw. 1457. Hargrave *v.* Ward. Hil. 9 W. 3.

3. Both the General Iſſue and a Special Plea.

181. The Manner of pleading a ſingle Plea in an Action of Treſpaſs, where the Defendant intends to juſtify the Whole Act complained of, except the Force and Arms, is to plead Not guilty as to the Force and Arms, and to juſtify as to the Reſidue. Co. Entr. 644, 647. Raſt. Ent. 605, 606.

182. It has indeed been holden in one Caſe, that, if the Defendant in an Action of Treſpaſs juſtify all the Reſidue of the Treſpaſs charged, it is not neceſſary to give an Anſwer as to the Force and Arms. 1 Saund. 81. Law *v.* King.

183. The Determination in this Caſe was probably founded upon a Suppoſition, that the Words *Vi et Armis* are Words of Form.

184. But the better Opinion is, as has been already obſerved, that theſe Words are Words of Subſtance. Ante, p. 191.

185. And if they are Words of Subſtance it ſeems neceſſary to give an Anſwer as to them.

186. If two Defendants in an Action of Treſpaſs have different Matters of Juſtification as to the whole Act complained of, it is proper for both to join in pleading Not guilty as to the Force and Arms; and then for each to plead ſeparately his Matter of Juſtification. Raſt. Entr. 612.

187. If two independent Acts are complained of in an Action of Treſpaſs, the Defendant may juſtify as to one Act, and plead Not guilty as to the Force and Arms and the other. Co. Entr. 651. Raſt. Entr. 606.

188. But if the Complaint be of Battery and falſe Impriſonment, it has been holden, that theſe are not two ſuch independent Acts, as to admit of the Defendant's pleading Not Guilty as to the Force and Arms and the Battery, and a Juſtification as to the Impriſonment: Becauſe in every falſe Impriſonment there is an implied Battery. Cro. Ja. 439. Eveley *v.* Sloley. Ld. Raym. 231, 232.

189. If

Ld. Raym. 231. Truſcot v. Carpenter.

189. If however it do in ſuch Caſe appear from the Declaration, that the Battery is an independent Act, the Defendant may plead Not guilty as to this and the Force and Arms, and juſtify as to the Impriſonment.

3 Lev. 404. Patrick v. Johnſon.

190. If the Complaint in an Action of Treſpaſs, conſiſt of four entirely independent Acts, the Defendant may plead Not guilty as to the Force and Arms and one of the Acts, and juſtify generally as to the other three Acts by the Words as to the Reſidue of the Treſpaſs, without enumerating them.

Ld. Raym. 231. Truſcot v. Carpenter. 3 Lev. 404.

191. And this is the ſafer Way of pleading; for if the Defendant, inſtead of relying upon the Words as to the Reſidue of the Treſpaſs, endeavoured to enumerate the other three Acts, and omit one of them, or any Circumſtance attending it, the Plea is bad.

Co. Entr. 651.

192. If the Complaint in an Action of Treſpaſs, to which two are Defendants, conſiſt of ſeveral independent Acts, one Defendant may plead Not guilty as to the Force and Arms and all the Reſidue of the Treſpaſs, except the Act as to which he juſtifies; and the other may plead Not guilty as to the Force and Arms and all the Reſidue of the Treſpaſs, except the Act as to which he juſtifies.

Bro. Bar. pl. 51.

193. The Defendant in an Action of Treſpaſs could not heretofore plead two Pleas, each of which went to the whole of the Treſpaſs alledged.

194. By the 4 *Ann. c.* 16. it is enacted, "That it ſhall be lawful for "any Defendant in any Action in any Court of Record, with Leave of the "Court, to plead as many ſeveral Matters, as he ſhall think neceſſary for "his Defence."

4. Of giving Colour.

195. Colour is a feigned Matter pleaded by the Defendant in an Action of Treſpaſs, from which the Plaintiff ſeems to have a good Cauſe of Action, whereas he has in Truth only an Appearance or Colour of Cauſe.

10 Rep. 91. Layfield's Caſe. Doct. pl. 77. 10 Rep. 89, 90. Layfield's Caſe.

196. The ſhewing of ſuch Matter by the Defendant is called giving Colour. As the Deſign of giving Colour is to draw the Determination of ſome Matter from the Jury to the Court, it is neceſſary, that the Colour given ſhould conſiſt of a Matter, which is not proper for the Determination of a Jury.

Cro. Ja. 122. 10 Rep. 89, 90.

197. If the Defendant in an Action of Treſpaſs *Quare Clauſum fregit* plead, that the Plaintiff claims the Cloſe, in which the Act complained of is charged to have been done, under Colour of a Deed of Feoffment by which Nothing paſſed, this is good Colour: Becauſe nothing paſſes by a Deed of Feoffment unleſs Poſſeſſion be delivered, and the Jury are not proper Judges of what does amount to Delivery of Poſſeſſion.

Cro. Ja. 122. Radford v. Harbyn. 10 Rep. 89.

198. But if the Defendant in an Action of Treſpaſs for Taking Goods plead, that the Plaintiff claims the Goods under Colour of a Deed of Gift by which nothing paſſed, this is not good Colour: Becauſe, as the Property in Goods veſts by a Deed of Gift without further Ceremony, the Defendant, by admitting the Deed of Gift, admits the Property in the Goods to be in the Plaintiff. In which Caſe, as there remains only a Queſtion of Fact to be tried, namely, whether there was a Deed of Gift, the Matter is proper for the Determination of the Jury.

199. If

199. If the Matter pleaded in an Action of Treſpaſs do entirely take away the Plaintiff's Right of Action, it is not neceſſary for the Defendant to give Colour: Becauſe the Queſtion in ſuch Caſe can only be, whether the Matter pleaded did in Fact exiſt, which is proper for the Determination of the Jury. 10 Rep. 90. Leyfield's Caſe. Doctr. pl. 77.

200. If the Defendant in an Action of Treſpaſs *Quare Clauſum fregit*, after deriving Title to himſelf under divers Conveyances, plead, that the Plaintiff claims under Colour of a Deed from the laſt Conveyer by which nothing paſſed, this is not good Colour; for he ought to have given Colour under the Perſon who firſt conveyed. 2 Roll. Rep. 140. Allen's Caſe.

201. If the Defendant in an Action of Treſpaſs *Quare Clauſum fregit* plead, that the Plaintiff claims under Colour of a Feoffment by which nothing paſſed, this is not good Colour; becauſe a Feoffment implies a Delivery of the Poſſeſſion: But if he plead, that the Plaintiff claims under Colour of a Deed of Feoffment by which nothing paſſed, this is good Colour: Becauſe there may not have been a Delivery of Poſſeſſion, and nothing does paſs under a Deed of Feoffment, unleſs Poſſeſſion be delivered. Ibid.

202. If the Defendant juſtify the ſeizing of Goods, for the Taking of which an Action of Treſpaſs is brought, as a Wreck, it is not neceſſary for him to give Colour; it not being material whoſe the Goods were before. 10 Rep. 90. Leyfield's Caſe.

203. If an Action of Treſpaſs be brought for the Taking of Corn ſet out for Tithe, it is not neceſſary for the Defendant to give Colour; it being not material whoſe the Corn was before it was ſet out for Tithe. 10 Rep. 91. Leyfield's Caſe.

204. It has been holden, that if the Defendant in an Action of Treſpaſs have omitted to give Colour, the Plaintiff can only take Advantage of the Omiſſion by a ſpecial Demurrer; the giving of Colour being a Matter of Form. 3 Leon. 267. Taylor *v.* Fiſher.

4. Of the Replication.

1. In the General.

205. If the Defendant in an Action of Treſpaſs plead any Matter in Excuſe or Juſtification, the Plaintiff muſt not only reply *De injuria ſua Propria*, but he muſt alſo traverſe the Matter ſpecially pleaded; otherwiſe no Iſſue can be joined; inaſmuch as the Words *De injuria ſua propria* do not amount to an expreſs Negative of the Matter ſpecially pleaded.

206. In ſome Caſes, it is ſufficient for the Plaintiff in an Action of Treſpaſs to traverſe the Matter ſpecially pleaded by the general Traverſe, which is *abſque tali Cauſa*; in others, the Matter ſpecially pleaded muſt be traverſed ſpecially.

207. If the Defendant in an Action of Treſpaſs plead Matter in Excuſe, the general Traverſe is ſufficient; becauſe, as no Right of doing the Act complained of is inſiſted upon, it is ſufficient for the Plaintiff to deny, that the Defendant had ſuch Excuſe. 8 Rep. 67. Crogate's Caſe. Doctr. Pl. 115. Finch. 395. 12 Mod. 581.

208. If the Defendant in an Action of Treſpaſs plead *Son Aſſault Demeſne*, the general Traverſe is ſufficient: Becauſe the Matter pleaded amounts only to an Excuſe. 8 Rep. 67. Crogate's Caſe. Doctr. Pl. 115.

209. If

Bro. De ſon Tort, pl. 18. pl.20. pl.50. pl. 53. 8 Rep. 67. 12Mod.581.

209 If the Defendant in an Action of Treſpaſs plead Matter of Record in Juſtification, this, provided it be material, muſt be ſpecially traverſed; it not being proper, that a Queſtion ariſing upon Matter of Record ſhould be determined by the Jury.

8 Rep. 67. Crogate's Caſe.

210. And for the ſame Reaſon, if the Matter pleaded by the Defendant in this Action in Juſtification, do as to Part conſiſt of Matter of Record, there muſt be a ſpecial Traverſe, notwithſtanding it do as to other Part conſiſt of Matter in *Pais*.

2 Leon.102. Parker *v.* Budon. 12 Mod.581, 583.

211. But if the Defendant in this Action alledge Matter of Record, meerly by Way of Inducement to another Matter ſpecially pleaded, it is not neceſſary to traverſe the Matter of Record ſpecially.

8 Rep. 67. Crogate's Caſe.

212. If the Defendant in an Action of Treſpaſs juſtify under the Proceſs of a Court of Admiralty, or of any other Court which is not a Court of Record, the general Traverſe is ſufficient.

Salk. 628. 12Mod.582, 583. Finch Law, 395. Co.Entr.643.

213. If the Defendant in an Action of Treſpaſs juſtify under a Right given by the Common Law to all Perſons, the general Traverſe is ſufficient.

Finch Law, 396. 8 Rep. 67. 3 Lev. 107. 12Mod.582.

214. But if the Defendant in this Action juſtify under a Right of Common, or a Right of Way, the general Traverſe is not ſufficient: For, as the Defendant does in ſuch Caſe inſiſt upon a Right peculiar to himſelf, this muſt be traverſed ſpecially.

12Mod.582. Chancey *v.* Wynn. Finch Law, 395.

215. If the Defendant in an Action of Treſpaſs juſtify the arreſting of a Man for a Breach of the Peace, as being a Conſtable, the general Traverſe is ſufficient; becauſe the Juſtification is under an Authority given by the Common Law to all Conſtables.

Bro. De ſon Tort, pl.14. pl. 53. Finch Law, 395. 12Mod 582.

216. But if the Defendant in this Action juſtify the arreſting of a Man under a Writ or Warrant to him directed, the general Traverſe is not ſufficient: But the Authority, it being to the Defendant in particular, muſt be ſpecially traverſed.

Co. Entr. 643. Salk. 628. 12Mod.582.

217. If the Defendant in an Action of Treſpaſs juſtify under a Right given by a publick Statute to all Perſons, the general Traverſe is ſufficient.

Finch Law, 396. 8 Rep. 67.

218. If the Defendant in an Action of Treſpaſs juſtify under a Licence from the Plaintiff, the general Traverſe is not ſufficient: But the Licence, it being to the Defendant in particular, muſt be ſpecially traverſed.

219. The general Rule of Law is, that a Traverſe ought not to be multifarious, but to be confined to one material Point.

220. But this Rule does not extend to the general Traverſe in an Action of Treſpaſs.

8 Rep. 67. Crogate's Caſe. 2 Leon. 81. Cro.Ja. 599. Salk. 4.

221. For if the Matter pleaded by the Defendant in this Action in Juſtification conſiſt of divers Parts, each of which would, if it had ſtood ſingle, have been traverſable by the general Traverſe, all theſe may be traverſed by the general Traverſe; becauſe all may be put in Iſſue thereby.

Salk. 4. Haywood *v.* Davies. Co. Entr. 649.

222. If the Plaintiff in an Action of Treſpaſs traverſe the Matter pleaded by the Defendant by a ſpecial Traverſe, the Traverſe muſt conclude with an Averment.

223. But if the Plaintiff in this Action traverſe the Matter pleaded by the Defendant by the general Traverſe, the Concluſion muſt be to the Country. Salk. 4. Haywood v. Davies. Co. Entr. 651.

224. If the Plaintiff in an Action of Treſpaſs declare upon a Poſſeſſion, and the Defendant juſtify under a Title, it is ſufficient for the Plaintiff to traverſe the Title ſet out by the Defendant, without ſhewing a Title in himſelf; for, if the Defendant have no Title, the Plaintiff ought to recover upon his Poſſeſſion. Str. 1238. Cary v. Holt. Cro. Eliz. 288. Poph. 1.

225. But if the Defendant in this Action juſtify under a Title, and it appear from the Record, that he was in Poſſeſſion before the Plaintiff came into Poſſeſſion, the Plaintiff muſt ſhew a Title in himſelf, as well as traverſe that ſet out by the Defendant; otherwiſe, although a Verdict ſhould be found for the Plaintiff, there is no Ground for the Court to give Judgment for him. Poph. 1, 2. Fehner v. Ficher.

226. If the Defendant in an Action of Treſpaſs plead a Seiſin in *J. S.* under whom he claims, the Plaintiff cannot reply a Seiſin in *J. N.* under whom he claims, without traverſing the Seiſin alledged by the Defendant: Becauſe the two Titles are inconſiſtent. Cro. Eliz. 30. Herring v. Blacklow. 1 Leon. 78. Lutw. 1343.

227. But if a Title, which is different from that ſet out by the Defendant in this Action, but not inconſiſtent therewith, be inſiſted upon by the Plaintiff, it is not neceſſary for him to traverſe the Defendant's Title.

228. If a Leaſe for Years, the Date of which is antecedent to the Commencement of the Defendant's Title, be replied by the Plaintiff in an Action of Treſpaſs *Quare Clauſum fregit* to a Plea of Freehold, it is not neceſſary to traverſe, that the Cloſe in which the Treſpaſs is charged is the Freehold of the Defendant: Becauſe the two Titles are not inconſiſtent. Dyer 171. 1 Jon. 352. Cro. Car. 384.

229. But if ſuch Leaſe be replied by the Plaintiff in this Action to a Plea of Feoffment, the Title of the Defendant muſt be traverſed: Becauſe the two Titles are inconſiſtent. 1 Jon. 352. Key v. Coke. Dyer 171.

230. It ſeems to have been doubted formerly, whether there muſt not always be a new Aſſignment, where the Plaintiff in an Action of Treſpaſs *Quare Clauſum fregit* has not given a Name to his Cloſe, and the Defendant has pleaded, that the Cloſe in which the Treſpaſs is charged is his Freehold. Cro Ja. 594. Richman v. Cox. Trin. 18 Ja. 1.

231. But it has been ſince holden, that the Plaintiff in this Action has in ſuch Caſe an Election, either to make a new Aſſignment, or to reply that the Cloſe in which the Treſpaſs is charged is his Freehold, with a Traverſe of its being the Freehold of the Defendant. Lutw. 1399. Huſtler v. Raines. Trin. 5 W. 3.

232. But if the Plaintiff do in ſuch Caſe reply, that the Cloſe in which the Treſpaſs is charged is his Freehold, he muſt conclude to the Country; for, although the Matter pleaded by the Defendant be not expreſsly denied by the Replication, yet it contains Matter ſo ſufficiently negative of the Matter pleaded by the Defendant, that an Iſſue may be taken upon it. Lutw. 1399. Huſtler v. Raines. 1 Inſt. 126.

233. If the Defendant in an Action of Treſpaſs juſtify under the Proceſs of an inferior Court, the Plaintiff cannot reply, that the Cauſe of Action did not ariſe within the Juriſdiction of the Court; for, as the Juriſdiction was not pleaded to, he ſhall not be received to ſay, that the Cauſe of Action did not ariſe therein. Ld. Raym. 233. Truſcot v. Carpenter.

234. If the Defendant in this Action juſtify an Arreſt under a ſufficient Warrant, the Plaintiff cannot reply that the Arreſt was not made under ſuch Warrant; but he ought to traverſe the Defendant's having had ſuch Warrant at the Time of the Arreſt: For although the Defendant did declare at the Time of the Arreſt, that he arreſted the Plaintiff under an inſufficient Warrant; yet if he had at that Time a ſufficient Warrant, he may, in caſe an Action be brought againſt him for the Arreſt, juſtify under the latter. Ld Raym. 465, 466. Greenvelt v. Burwell.

Bro. Repl. pl. 54. Bro. Trav. pl. 267.

235. If the Defendant in an Action of Treſpaſs juſtify the Taking of Corn, as having been ſet out for the Tithe of Corn which grew in a Cloſe called *A.* in the Pariſh of *B.* the Plaintiff cannot in his Replication traverſe the growing of the Corn in this Cloſe; for, if it grew any where within the Pariſh of *B.* the Perſon intitled to the Tithe of Corn in that Pariſh had a Right to take it: But the Plaintiff may traverſe the growing of the Corn in the Pariſh of *B.*

Bro. Trav. pl. 385.

236. If the Defendant in an Action of Treſpaſs *Quare Clauſum fregit* plead, that being the Servant of *J. S.* he by the Command of *J. S.* put a Beaſt the Property of *J. S.* who had a Right of Common there, into the Cloſe in which the Treſpaſs is charged, the Plaintiff may reply, that he put in a Beaſt of his own, without traverſing the having put in the Beaſt of *J. S.* for the Defendant may have put in a Beaſt of his own as well as one of *J. S.* But the Defendant may in his Rejoinder traverſe the having put in a Beaſt of his own.

Sty. 357. Baker *v.* Andrews.

237. If the Defendant in an Action of Treſpaſs plead, that his Beaſt went into the Plaintiff's Cloſe through a Fence belonging to the Plaintiff, which was out of Repair, the Plaintiff may reply, that it went through another Fence, without ſaying what Fence or traverſing its having gone through his Fence: For, if the Beaſt did not go through the Plaintiff's Fence, it is quite immaterial what Fence it did go through.

3 Lev. 133. Bridgwater *v.* Betheway.

238. If the Defendant in an Action of Treſpaſs, who had a Licence in Law to do the Act complained of, juſtify under the Command of another, the Plaintiff cannot traverſe the Command in his Replication; becauſe the Pleading thereof was not neceſſary.

Bro. De ſon Tort, pl. 13.

239. It has been holden, that if the Defendant in an Action of Treſpaſs, *Quare Clauſum fregit* juſtify the entering into the Cloſe in which the Treſpaſs is charged by the Command of *J. S.* in whom the Freehold is alledged to be, the Plaintiff is not obliged to traverſe in his Replication, that the Cloſe is the Freehold of *J. S.* or to ſhew a Title in himſelf: It being ſufficient to traverſe the Command.

Salk. 107. 6 Rep. 24. Doctr. Pl. 352.

240. But it is laid down in other Books, that it is in ſuch Caſe neceſſary for the Plaintiff to traverſe in his Replication that the Cloſe is the Freehold of *J. S.* for that the Command is not traverſable.

Salk. 107. Trevillian *v.* Pine.

241. And it is in one of theſe Books laid down, that a Traverſe of the Command in ſuch Caſe would be an Admiſſion that the Cloſe is the Freehold of *J. S.* and conſequently it would take away the Plaintiff's Right of Action: Becauſe the Injury would then have been done to *J. S.* and not to the Plaintiff.

Salk. 107. Trevillian *v.* Pine. 6 Rep. 24. 2 Leon. 196, 215. Ld. Raym. 309.

242. If the Defendant in an Action of Treſpaſs *Quare Clauſum fregit*, juſtify the diſtraining of a Beaſt Damage-feaſant by the Command of *J. S.* in whom a Right of diſtraining is alledged to be, the Plaintiff may traverſe the Command in his Replication; for, although it be thereby admitted that *J. S.* had a Right to diſtrain, the Defendant, unleſs he had the Command of *J. S.* to diſtrain, has done an Injury to the Plaintiff.

Cro. Eliz. 14. The Earl of Bedford's Caſe. 1 Roll. Rep. 46. 1 Leon. 50. 2 Leon. 196, 216. 3 Lev. 20.

243. It is laid down, that if the Defendant in an Action of Treſpaſs juſtify as Bailiff of *J. S.* it is not neceſſary for the Plaintiff to traverſe his having acted as Bailiff of *J. S.*

244. But it is in other Books laid down, that the having acted as Bailiff of *J. S.* muſt in ſuch Caſe be traverſed.

3 Lev. 20. Dobſon *v.* Douglas. Salk. 107.

245. If the Defendant in an Action of Treſpaſs juſtify the diſtraining of a Beaſt Damage-feaſant as Bailiff of *J. S.* the Plaintiff cannot reply, that the Defendant

Defendant diſtrained the Beaſt without the Command of *J. S.* Becauſe, as every Bailiff has a general Authority to diſtrain, the Command of *J. S.* was not neceſſary to enable the Defendant to diſtrain.

2. Of making a new Aſſignment.

246. A new Aſſignment in an Action of Treſpaſs is an Aſcertainment by the Plaintiff, in his Replication, of the Place where, or the Time when, the Treſpaſs charged in his Declaration was committed.

247. If the Plaintiff, in his Declaration in an Action of Treſpaſs *Quare Clauſum fregit* charge a Treſpaſs in a Cloſe in the Pariſh of *B.* and the Defendant juſtify doing the Act complained of in a Cloſe in the Pariſh of *B.* named in his Plea, which is his Freehold, the Plaintiff may in his Replication make a new Aſſignment. Salk. 453. Helvis *v.* Lamb. 6 Mod. 119.

248. And it is neceſſary for the Plaintiff ſo to do; otherwiſe, if it be proved at the Trial, that there is a Cloſe in the Pariſh of *B.* which is the Freehold of the Defendant, there muſt be a Verdict for him: Becauſe the Plaintiff has not aſcertained his Cloſe by Name. Salk. 453. Helvis *v.* Lamb. 6 Mod. 119.

249. But if, in an Action of Treſpaſs *Quare Clauſum fregit*, a Treſpaſs be charged in a Cloſe in the Pariſh of *B.* belonging to the Plaintiff; and the Defendant juſtify the doing of the Act complained of in a Cloſe containing ſix Acres in the Pariſh of *B.* which is his Freehold; and the Plaintiff reply, that the Cloſe in which the Treſpaſs is charged containing ſix Acres in the Pariſh of *B.* is his Freehold; and it appear in Evidence, that the Plaintiff has a Cloſe containing ſix Acres in the Pariſh of *B.* and the Defendant another Cloſe containing ſix Acres in that Pariſh, there muſt be a Verdict for the Plaintiff; becauſe, as the Defendant has not given a Name to his Cloſe, it was not neceſſary for the Plaintiff to aſcertain his Cloſe by Name: inaſmuch as the Plea of the Defendant ſhall be intended to relate to the Cloſe of the Plaintiff. Dyer 23. Anon.

250. It has been doubted, whether the Plaintiff can make a new Aſſignment as to the Place in an Action of Treſpaſs, except it be an Action of Treſpaſs *Quare Clauſum fregit*. 1 Freem. 238. Carth. 176.

251. But it ſeems to be the better Opinion, that the making of a new Aſſignment is not confined to this Action. Cro. Ja. 141. Salk. 453. 1 Freem. 238, 2. 6. 6 Mod. 120.

252. It is indeed true, that the Plaintiff cannot make a new Aſſignment as to the Place in an Action of Treſpaſs, which is brought for a tranſitory Treſpaſs.

253. But it is likewiſe true, that it is never neceſſary to make a new Aſſignment as to the Place where the Treſpaſs is tranſitory; becauſe the Place is never material in ſuch Treſpaſs. Carth. 176. Alſtone *v.* Hutchinſon.

254. But if an Action of Treſpaſs be brought for Taking Goods, and the Defendant juſtify the Taking of them Damage-feaſant in a Place named in his Plea, the Plaintiff may by a new Aſſignment charge, that they were taken in a Place different from that in which the Defendant has juſtified; for the Treſpaſs, which is in its Nature tranſitory, is by this Plea made local, and conſequently the Place becomes material. Cro. Ja. 141. Batt *v.* Beadley. Salk. 453. Ld. Raym. 121.

255. As only Damages can be recovered in an Action of Treſpaſs, a new Aſſignment as to the Place is good, notwithſtanding the Treſpaſs is charged to have been committed upon a larger Quantity of Land than is mentioned in the Declaration. Winch 65. Avis *v.* Cennie.

256. If by the Defendant's Plea in an Action of Treſpaſs the Time be made material, the Plaintiff may make a new Aſſignment as to this.

6 Mod. 112. Elwis v. Lombe.

257. If the Defendant in an Action of Treſpaſs plead *ſon Aſſault Demeſne* at one Hour of the Day, upon which an Aſſault and Battery are charged, the Plaintiff may by a new Aſſignment charge another Aſſault and Battery at another Hour of the ſame Day.

Ibid.

258. And if the Plaintiff do not in this Caſe make a new Aſſignment, there muſt be a Verdict for the Defendant, provided he prove that the Plaintiff did make an Aſſault upon him at any Time of the Day mentioned in the Declaration, although the Defendant did make an Aſſault upon the Plaintiff at another Time of the ſame Day.

Lutw. 1401. Huſtler v. Raines.

259. If the Plaintiff in an Action of Treſpaſs make a new Aſſignment, either as to the Time or Place, he muſt conclude with an Averment.

Ante, p. 206.

260. The Certainty, which is required in the Declaration in an Action of Treſpaſs, has been already ſhewn.

Dyer 264. Anon.

261. It is ſufficient to ſay in this Place, that as the Replication in this Action is, ſo far as it contains a new Aſſignment, a new Declaration, the ſame Certainty is required, as to that Part of the Replication, which contains a new Aſſignment, as is required in the Declaration.

Moor 540. Odiham v. Smith. Bro. Treſp. pl. 3. pl. 168.

262. As the Replication in an Action of Treſpaſs is, ſo far as it contains a new Aſſignment, a new Declaration, the Defendant may in his Rejoinder plead new Matter in Juſtification.

Cro. Eliz. 812. Prettyman v. Lawrence.

263. But the Defendant can only plead new Matter in his Rejoinder, as to ſo much of the Replication as contains a new Aſſignment; for if any Part of his Plea be traverſed in the Replication, the Defendant cannot as to this plead new Matter, but muſt ſtand by what he had before pleaded.

Bro. Treſp. pl. 3. pl. 168. Cro. Eliz. 355, 493.

264. The Defendant in an Action of Treſpaſs cannot in his Rejoinder aver, that the Place or Time, newly aſſigned in the Replication, is the ſame that is mentioned in the Plea; for he ſhall not be received to ſay, that either of theſe is the ſame, when the Plaintiff has by making a new Aſſignment averred that it is different.

Bro. Treſp. pl. 3. pl. 168. Cro. Eliz. 355, 493.

265. Nor is it neceſſary for the Defendant to do this: The Plaintiff being eſtopped, by having made a new Aſſignment, from giving Evidence of the Commiſſion of a Treſpaſs in the Place or at the Time mentioned in the Plea.

(K) Of the Evidence in an Action of Treſpaſs.

1 Inſt. 283. Cro. Eliz. 32. 5 Mod. 286.

1. IF the Time be not material in an Action of Treſpaſs, Evidence may be given of a Treſpaſs committed at any Time before the bringing of the Action, although it were committed after the Time mentioned in the Declaration.

Skin. 641. Wilſon v. Powell. Salk. 639.

2. If the Treſpaſs charged in an Action of Treſpaſs be not laid with a *Continuando*, the Plaintiff can only give Evidence of one Treſpaſs.

Ld. Raym. 240.

Skin. 641. Wilſon v. Powell.

3. Although the Treſpaſs charged in an Action of Treſpaſs be laid with a *Continuando* for the whole Time, from the Day on which the firſt Treſpaſs is charged in the Declaration until a ſubſequent Day therein mentioned, it is not

not neceſſary for the Plaintiff to prove a Continuance of the Treſpaſs for the whole Time.

4. If the Declaration in an Action of Treſpaſs charge a Treſpaſs with a *Continuando* to a Time ſubſequent to the bringing of the Action, Evidence may be given of a Continuance to the Time of bringing the Action; becauſe the Plaintiff may recover for the Continuance to this Time. Str. 1095. Webb v. Turner. 2 Mod. 253.

5. If the Plaintiff in an Action of Treſpaſs *Quare Clauſum fregit* have ſet out a Title, in a Caſe wherein it was not neceſſary ſo to do, it is not neceſſary to prove the Title. 2 Bulſt. 288. Willamore v. Bamford.

6. Every Abuttal of the Cloſe in which the Treſpaſs is charged, which is ſet out in the Declaration in an Action of Treſpaſs *Quare Clauſum fregit*, muſt be proved with ſome Degree of Exactneſs. 2 Roll. Abr. 677. Dyer 161.

7. If the Treſpaſs charged in this Action be alledged in a Cloſe abutting towards the South upon a Windmill in the Occupation of *J. S.* it muſt not only be proved, that the Cloſe did abut towards the South upon a Windmill, but that the Windmill upon which it did abut was in the Occupation of *J. S.* 2 Roll. Abr. 677. Nowell v. Sands.

8. But it is not neceſſary, that an Abuttal ſhould be proved preciſely as it is ſet out in the Declaration in an Action of Treſpaſs *Quare Clauſum fregit*.

9. If the Treſpaſs charged in this Action be alledged in a Cloſe abutting towards the South upon a Windmill, it is ſufficient to prove, that there is a Windmill towards the South of the Cloſe, although it do likewiſe come out in Evidence, that there is a Highway between the Cloſe and the Windmill. 2 Roll. Abr. 688. Nowell v. Sands.

10. If the Treſpaſs charged in this Action be alledged in a Cloſe abutting upon a Cloſe called *A.* towards the Eaſt; and it be proved, that the Situation of the Cloſe called *A.* is towards the North of the Cloſe in which the Treſpaſs is charged; yet if it be likewiſe proved, that it is a Point or two towards the Eaſt thereof, this is ſufficient Proof of the Abuttal. 2 Roll. Abr. 678. Mildmay v. Dean.

11. It is ſaid by *Holt* Ch. J. That, if the *Venue* in an Action of Treſpaſs *Quare Clauſum fregit* be laid in the Pariſh of *Needham*, it is not ſufficient for the Plaintiff to prove a Treſpaſs in the Pariſh of *Needham* Market. Salk. 452.

12. If the Declaration in an Action of Treſpaſs charge the Taking of a Stack of Corn, and the Plaintiff only prove the Taking of eight Comb of Corn out of the Stack, he is intitled to recover for ſo much. 2 Roll. Abr. 684. pl. 6.

13. But if an Action of Treſpaſs be brought for cutting down Trees and the Plaintiff only prove a Lopping of the Trees, he is not entitled to recover. Dyer 26, 27.

14. And it is ſaid that the Plaintiff in this Action cannot recover, if it appear in Evidence that the Trees were ſtubbed. 2 Roll. Abr. 720.

15. If an Action of Treſpaſs be brought for the Meſne Profits of Premiſſes, which have been recovered in an Action of Ejectment, it is ſufficient, whether the Action be brought in the Name of the nominal Plaintiff, or of the Leſſor of the Plaintiff, to prove the Value of the Premiſſes; for the Defendant cannot in either Caſe controvert the Title of the Plaintiff. 1 Sid. 239. 2 Barn. 367.

16. If after Judgment by Default againſt the caſual Ejector an Action of Treſpaſs for the Meſne Profits be brought by the Leſſor of the Plaintiff, in the Name of the nominal Plaintiff in the Action of Ejectment, he cannot recover, unleſs he prove an actual Poſſeſſion of the Premiſſes in himſelf. 2 Barn. 367. Stanynought v. Coſins.

17. An Action of Treſpaſs for the Meſne Profits was brought by the Leſſor of the Plaintiff, in the Name of the nominal Plaintiff in the Action of Aſſin. MS. Rep. Aſſin v. Parkin, Mich. 32 G. 2. in B. R.

of Ejectment, after Judgment by Default againſt the caſual Ejector. At the Trial of the Cauſe the Plaintiff proved the Judgment, the Writ of Poſſeſſion and the Return of Poſſeſſion delivered thereupon, the Occupation of the Premiſſes by the Defendant and the Value thereof. It was inſiſted, that, as the Judgment was againſt the caſual Ejector and not againſt the Tenant in Poſſeſſion, all this did not ſufficiently prove an actual Poſſeſſion in the Leſſor of the Plaintiff: But Lord *Mansfield* Ch. J. before whom the Cauſe was tried, was of Opinion that it did; and all the Judges upon the Caſe being referred to them concurred with him in Opinion. The Opinion of the Judges, which was delivered by Lord *Mansfield* was to this Effect. Although the Names of fictitious Parties are made uſe of in an Action of Ejectment, the Leſſor of the Plaintiff and the Tenant in Poſſeſſion are to be conſidered as the real Parties; and if ſo, the Leſſor of the Plaintiff does as well obtain an actual Poſſeſſion, by the Delivery of Poſſeſſion under a Writ of Poſſeſſion, when the Judgment is by Default againſt the caſual Ejector, as when it is upon a Verdict againſt the Tenant in Poſſeſſion.

MS. Rep. Hawkins *v.* Waller, Trin. 3 G. 3. in C. B.

18. In a Caſe reſerved in an Action of Treſpaſs it was ſtated, that the Property in a certain Wall was in the Plaintiff, and that he had not many Years ago built a Summer Houſe thereupon: But that the Occupiers of a Houſe in which the Defendant dwelt had from Time to Time, for fifty Years paſt, nailed Fruit Trees to the Wall; and the Queſtion was, if this was Evidence of ſuch a Poſſeſſion of the Wall in the Defendant as did ouſt the Plaintiff of his Poſſeſſion, and conſequently take away his Right of Action againſt the Defendant for having nailed Fruit Trees thereto. It was holden not to be ſo. And by *Pratt* Ch. J.—The long Enjoyment would perhaps have been Evidence of a Licence to nail Fruit Trees to the Wall, in Caſe a Licence had been pleaded: But if this ſhould be allowed, to be Evidence of Poſſeſſion of the Wall in the Defendant ſufficient to ouſt the Plaintiff of his Poſſeſſion, it would tend to introduce Confuſion of Property; it being the Practice in all Places, for Perſons to nail Fruit Trees to the Walls of their Neighbours. The Caſe which has been cited, wherein it was holden that *J. S.* had the Poſſeſſion of a Mine, although it was under Ground in the Poſſeſſion of *J. N.* is not like the preſent Caſe. In that Caſe *J. S.* was in the actual Poſſeſſion of the Mine, and the only Queſtion was, whether, as his Poſſeſſion had been obtained by beginning to dig in Ground in his own Poſſeſſion, and afterwards digging ſecretly under Ground in the Poſſeſſion of *J. N.* it were a rightful one: But in the preſent Caſe the Defendant never was in the Poſſeſſion of the Wall; for the Plaintiff has all along been in the Poſſeſſion thereof, and did not many Years ago build a Summer-Houſe thereupon.

Cro. Eliz. 493. Freeſton *v.* Crouch.

19. If the Defendant in an Action of Treſpaſs *Quare Clauſum fregit* juſtify in a Cloſe by Name, the Plaintiff, if he make a new Aſſignment, cannot give Evidence of a Treſpaſs in the Cloſe juſtified in; for by making a new Aſſignment he has waved the Right of doing this.

1 Sid. 225. Sippora *v.* Baſſet. Cro. Ja. 534.

20. It is in the general true, that the Plaintiff in an Action of Treſpaſs cannot give Evidence of any Injury, which is not expreſsly charged in the Declaration.

1 Sid. 225. Sippora *v.* Baſſet. Cro Ja. 534.

21. But where an Injury ariſes *ex turpi Cauſa*, as from debauching a Daughter of the Plaintiff, the Law, for the Sake of preſerving the Chaſtity of the Record, does allow this to be given in Evidence in an Action of Treſpaſs under the general Words *and other Wrongs*.

22. If

22. If an Injury for which an Action of Treſpaſs does lie be charged in the Declaration, the Plaintiff may after proving this give Evidence of any Circumſtance charged in the Declaration, which attended the Injury, in Aggravation of Damages; although an Action of Treſpaſs could not be maintained on the Account of that Circumſtance alone.

23. The Declaration in an Action of Treſpaſs charged the breaking and entering of the Plaintiff's Houſe, and the beating of his Children; and there was a general Verdict for him with intire Damages. On a Motion in Arreſt of Judgment it was inſiſted, that the Plaintiff could not recover for the beating of his Children; becauſe it is not alledged, that he had received any ſpecial Damage from thence. It was holden that the Plaintiff ought to have Judgment. And by the Court—This Action is brought for breaking and entering the Houſe, and what is further alledged is only to ſhew the Enormity of the Treſpaſs. The Plaintiff cannot recover any Damages in this Action for the Loſs of his Children's Service, nor could he give this in Evidence; becauſe he may bring another Action for that Injury: But he had a Right to give the beating of the Children in Evidence in the preſent Action, it being a Circumſtance which attended the breaking and entering of his Houſe, in order to aggravate the Damages. Salk. 642. Newman v. Smith.

24. The Plaintiff in an Action of Treſpaſs declared, that the Defendant broke and entered his Houſe, and made an Aſſault upon his Wife. A general Verdict being found for the Plaintiff with entire Damages it was inſiſted on a Motion in Arreſt of Judgment, that the Plaintiff, although he has not entitled himſelf thereto by laying a *per quod ſervitium amiſit*, would by this Verdict recover a Satisfaction for the Aſſault upon his Wife, which he ought not to do: Becauſe, as the Wife has not joined in this Action, a Right of Action would ſurvive to her, and conſequently ſhe might, notwithſtanding the Recovery of the Huſband in the preſent Action, hereafter bring another Action for the ſame Injury. The Rule for arreſting the Judgment was diſcharged. And by the Court—The Plaintiff in an Action of Treſpaſs may join that in his Declaration, in order to aggravate the Damages, for which he cannot recover ſingly; and for which another Perſon may maintain an Action. Str. 61. Dix v. Brookes.

25. In the latter Caſe the Authority of *Newman* v. *Smith* was expreſsly recognized.

26. Every Thing, which amounts to a Denial of the Right of Action, may be given in Evidence by the Defendant in an Action of Treſpaſs upon the General Iſſue.

27. A Leaſe for Years may be given in Evidence in an Action of Treſpaſs *Quare Clauſum fregit* upon the General Iſſue: Becauſe this, which is a Denial of the Poſſeſſion of the Plaintiff, amounts to a Denial of the Right of Action. Bro. Gen. Iſſ. pl. 82.

28. But a Leaſe at Will cannot in this Action be given in Evidence upon the general Iſſue: Becauſe ſuch Leaſe, which amounts only to a Licence, ought to have been pleaded. Ibid.

29. An Action of Treſpaſs *Quare Clauſum fregit* being brought for breaking the Cloſe and eating the Germins of the Plaintiff there growing, it appeared, that the Defendant claimed under a Leaſe for Years, in which there was a Reſervation of the Trees; that ſome of the Trees had been cut down; and that the Germins, for the eating of which by the Defendant's Cattle the Action was brought, grew from the Roots thereof. It was holden, that as the Defendant, who had a Right of depaſturing his Cattle in the Cloſe, could not prevent their eating the Germins, the Right of eating them might be given in Evidence upon the General Iſſue; becauſe it amounted to a Denial of the Right of Action. 1 Jon. 388. Clitherow v. Higgs.

30. If

1 Inſt. 283. Bro. Gen. Iſſ. pl. 46.

30. If an Action of Treſpaſs be brought for taking a perſonal Chattel, the Defendant may upon the General Iſſue give in Evidence a Gift thereof by the Owner: Becauſe this, which amounts to a Denial of the Plaintiff's Property, is a Denial of the Right of Action.

Str. 61. Dryer *v.* Mills.

31. But the taking of a perſonal Chattel as a Deodand cannot be given in Evidence by the Defendant in this Action upon the general Iſſue; becauſe, as this does not amount to a Denial of the Plaintiff's Property, it ought to have been pleaded, and then the Plaintiff would have had an Opportunity of giving an Anſwer thereto.

Salk. 4. Haywood *v.* Davies.

32. If one Tenant in common bring an Action of Treſpaſs *Quare Clauſum fregit* againſt another, the latter may upon the general Iſſue give in Evidence that he is Tenant in Common with the Plaintiff; for this amounts to a Denial of the Right of Action.

Ibid.

33. But if one Tenant in Common bring this Action againſt a Stranger, the Stranger cannot give in Evidence upon the general Iſſue, that *T. N.* who is not named in the Writ, is Tenant in common with the Plaintiff: Becauſe this ought to have been pleaded in Abatement.

1 Inſt. 283. Salk. 287. 12 Mod. 412.

34. It is in the general true, that the Defendant in an Action of Treſpaſs cannot give any Matter in Evidence upon the General Iſſue, which amounts to a Juſtification or Excuſe of the Act complained of, or to a Diſcharge of the Treſpaſs; Becauſe every ſuch Matter, as it does not amount to a Denial of the Right of Action, ought to have been pleaded.

Cro. Eliz. 245. Taylor *v.* Fiſher. Bro. Treſp. pl. 295.

35. A Licence cannot be given in Evidence in this Action upon the General Iſſue; becauſe this ought to have been pleaded in Juſtification.

1 Inſt. 283. Keilw. 203.

36. The Defendant in this Action cannot give in Evidence upon the General Iſſue, that his Beaſt eſcaped into the Plaintiff's Cloſe through the Fence of the Plaintiff which was out of Repair: Becauſe this ought to have been pleaded in Excuſe.

37. But the Defendant in an Action of Treſpaſs is in divers Caſes enabled by Statutes to give the ſpecial Matter in Evidence upon the General Iſſue, notwithſtanding it amounts to a Juſtification.

38. By the 7 *Ja.* 1. *c.* 5. it is enacted, "That if an Action of Treſpaſs be brought againſt any Juſtice of the Peace, Mayor or Bailiff of any City or Town corporate, Headborough, Portreeve, Conſtable, Tithing-Man or Collector of any Subſidy, for any Thing by him done by Virtue or Reaſon of his Office; or againſt any other Perſon, for any Thing by him done in Aid or Aſſiſtance of or by the Commandment of either of theſe touching or concerning his Office, it ſhall be lawful for the Defendant to plead the General Iſſue, and to give any ſpecial Matter in Evidence, which had it been pleaded would have been ſufficient in Law to have diſcharged ſuch Defendant of the Treſpaſs."

39. By the 11 *G.* 2. *c.* 19. *par.* 2. it is enacted, "That if an Action of Treſpaſs be brought againſt a Perſon intitled to Rents or Services of any Kind, or his or her Bailiff, Receiver or other Perſon, relating to any Entry by Virtue of this Act, otherwiſe, upon any Premiſſes chargeable with ſuch Rents or Services, or to any Diſtreſs or Seiſure, Sale or Diſpoſal of any Goods or Chattels thereupon; it ſhall be lawful for the Defendant in ſuch Action to plead the General Iſſue, and to give the ſpecial Matter in Evidence, any Law or Uſage to the contrary notwithſtanding."

40. And without mentioning any other Statute in particular, it may in the general be obſerved, that in almoſt every Statute, which has of late Years been made for amending a Highway, or for doing any Thing of publick Concern, there is a Clauſe to the ſame Effect.

41. The

41. It is in the general true, that the Defendant in an Action of Treſpaſs cannot give a Matter in Evidence upon the General Iſſue, which might have been pleaded in Bar. 6 Mod. 135. Dove v. Smith.

42. But in ſome Caſes a Matter which cannot be pleaded in Bar of an Action of Treſpaſs, may be given in Evidence by the Defendant upon the General Iſſue in Mitigation of Damages.

43. It cannot be pleaded in Bar of an Action of Treſpaſs, that the Goods for the Taking of which it is brought have been reſtored to the Plaintiff: But this may be given in Evidence by the Defendant on the general Iſſue in Mitigation of Damages; for although the Plaintiff be intitled to recover, he ought only to recover Damages for taking the Goods, and detaining them until they were reſtored. Bro. Gen. Iſſ. pl. 11. pl. 15.

44. If an Action of Treſpaſs be brought by a rightful Executor againſt an Executor *de ſon tort*, the latter cannot plead Payment of the Teſtator's Debts, to the Amount of the Aſſets which came to his Hands in Bar of the Action: But he may give this in Evidence upon the general Iſſue in Mitigation of Damages. 12 Mod. 441.

45. If an Action of Treſpaſs be brought by a Huſband for criminal Converſation with his Wife, the Defendant cannot plead a Licence from the Huſband, becauſe a Huſband has not a Power to grant ſuch Licence in Bar of the Action; or that the Wife was a lewd Woman, becauſe it does by no Means follow, that he had a Right to do what he is charged with having done: But he may give either of theſe Matters in Evidence upon the General Iſſue in Mitigation of Damages. 12 Mod. 232. Coot v. Barty.

TRIAL.

THERE are ſeveral Methods of Trial which have for many Years been diſcontinued, of which it would not be foreign to the preſent Title to give an Account: But as this has been done by divers Authors, and nothing new can be thereto added, they are omitted.

As divers Things, which might very well have been treated of under this Title, have already been treated of under the Titles *Actions Local and Tranſitory*, *Bill of Exceptions*, *Evidence and Jurors*, it is not neceſſary to repeat any of theſe.

Another Thing which might likewiſe very well have been treated of under this Title, namely *Verdict*, ſhall be treated of under the Title *Verdict*.

The remaining Matter which appertains to this Title ſhall be ranged in the following Order.

(A) Of a Trial by the Court.

1. In the General.
2. Upon Inſpection.
3. Upon the Examination of Witneſſes.

(B) Of a Trial by a Record.
(C) Of a Trial by a Certificate.
(D) Of a Trial by a Jury.
(E) Of a Trial at Bar.
(F) Of a Trial at Niſi Prius.
(G) Of Notice of Trial.
(H) Of putting off a Trial.
(I) At what Time an Indictment may be tried before Juſtices of Oyer and Terminer.

(K) Of the Manner of trying, where more than one Iſſue is to be tried.
(L) Of granting a new Trial.

1. In the General.
2. After a Trial at Bar.

3. On

3. On Account of a Defect, or Miſtake of the Judge before whom the Cauſe was tried.
4. On Account of a Defect, Miſtake, or Fault of the Jury by whom the Cauſe was tried.
5. On Account of a Neglect, or Miſtake, of a Counſellor or an Attorney in the Cauſe.
6. On Account of a Neglect, Miſtake, or Fault, of one of the Parties or one of his Witneſſes.
7. In an Action of Ejectment.
8. In a Penal Action.
9. In an Indictment or Information.

(A) Of a Trial by the Court.

1. In the General.

1. EVERY Queſtion of Law ariſing in a Cauſe is to be tried by the Court, it being an univerſal Maxim, that *Cuilibet in arte ſua perito eſt Credendum*; and it being Maxim of Law, that *ad Quæſtionem Juris non reſpondent Juratores.* 1 Inſt. 125.

2. If a Queſtion ariſe, whether a certain Sentence be a Maxim of Law, it is to be tried by the Juſtices. Bro. Trial, pl. 143.

3. A Queſtion concerning the Practice of a Court is to be tried by the Court; for the Practice of every Court is the Law of that Court. 9 Rep. 30. Abbot of Strata Marcella's Caſe. 12 Mod. 572, 573.

4. It is the Province of the Juſtices to determine, what the Meaning of a Word or Sentence in an Act of Parliament is. Bro. Trial, pl. 143. 2 Inſt. 611.

5. If a Man, who at the Time of his Death was ſeiſed of a Houſe, had any Goods therein, his Executors or Adminiſtrators ſhall have a reaſonable Time to take them away; and the Juſtices ſhall judge what is a reaſonable Time. 1 Inſt. 56.

6. The Reaſonableneſs of a Fine, which has been aſſeſſed by the Lord of a Manor on the Admiſſion of a Tenant to a Copyhold Eſtate, ſhall be determined by the Juſtices upon the Circumſtances of the Caſe. Ibid.

7. If a Queſtion ariſe concerning the Exiſtence of a general Cuſtom it is to be tried by the Juſtices: Becauſe every general Cuſtom is a Part of the Common Law. Bro. Trial, pl. 143. 12 Mod. 573.

8. It is in the general true, that a Queſtion concerning the Exiſtence of a Cuſtom of a particular Place, is to be tried by a Jury. Bro. Trial, pl. 143.

9. But if a Queſtion ariſe concerning the Exiſtence of a Cuſtom of the City of *London*, it is, unleſs the Corporation be intereſted in the Eſtabliſhment of the Cuſtom, to be tried by the Certificate of the Mayor and Aldermen. 1 Inſt. 74. 2 Roll. Abr. 579, 580.

10. A Queſtion concerning the legal Effect of a Deed is to be tried by the Court; becauſe this, which depends upon the Conſtruction of the Deed, is a Queſtion of Law. 1 Inſt. 225. Bro. Condition, pl. 183. 2 Freem. 146.

11. But

1 Inſt. 225. 11. If a Queſtion ariſe, whether a Deed have been ſealed and delivered, this, it being a Queſtion of Fact, is to be tried by a Jury.

Ibid. 12. It is the Province of a Jury to try, whether a Raſure or Interlineation in a Deed were made before the Delivery of the Deed, this being a Queſtion of Fact.

Ibid. 13. But if the Queſtion be, whether the Raſure or Interlineation in a Deed be of a Thing material, it is to be tried by the Court; becauſe this Queſtion, which depends upon the Conſtruction of the Deed, is a Queſtion of Law.

2. Upon Inſpection.

14. If a Perſon would avoid or reverſe an Act, becauſe it was done during his Nonage, the Queſtion, whether he were of full Age at the Time it was done, is ſometimes to be tried by a Jury, at other Times by the Court upon Inſpection of the Perſon.

1 Inſt. 380. 1 Sid. 322. 15. If the Act, which a Perſon would avoid, becauſe it was done during his Nonage, were an Act in *Pais*, the Queſtion, whether he were of full Age at the Time it was done, is to be tried by a Jury.

1 Inſt. 380. 16. But if a Perſon would avoid or reverſe a judicial Act becauſe it was done during his Nonage, the Queſtion, whether he were of full Age at the Time it was done, is to be tried by the Court upon Inſpection: For every judicial Act ſhall be intended to have been rightly done until the contrary appear; and it is more proper, that it ſhould be tried by the Court than by a Jury, whether the Act were rightly done.

Ibid. 17. An Act in *Pais*, which is voidable becauſe it was done during Nonage, may be tried by the Court upon Inſpection, after the Party who would avoid or reverſe it is of full Age.

1 Bulſtr. 206. 1 Inſt. 380. 1 Sid. 321. 18. There is ſome Diſagreement in the Books as to the Point: But it ſeems to be the better Opinion, that a judicial Act cannot be tried by the Court upon Inſpection, after the Party who would avoid or reverſe it is of full Age.

1 Inſt. 380. Cro. Ja. 50. 19. If there have been a Trial by the Court upon Inſpection during the Nonage of a Perſon, and he be recorded to be within Age, a judicial Act may be avoided or reverſed by him, becauſe it was done during his Nonage, after he is of full Age.

Moor 189. Cro. Ja. 230. 20. If the Conuſee delay the ingroſſing of a Fine, of which an Infant is Conuſor, the Court will at the Prayer of the Infant try his Age by Inſpection, in order to prevent his being precluded from bringing a Writ of Error, in caſe he ſhould be of full Age before the Fine is ingroſſed.

Cro. Eliz. 616 Graves v. Short. 2 Roll. Abr. 572. pl. 2. 9 Rep. 30. 21. If a Writ of Error be brought to reverſe a Fine, and the Error aſſigned be Nonage of the Plaintiff in Error at the Time of levying the Fine, the Queſtion, whether he be of full Age, is to be tried by the Court upon Inſpection.

1 Inſt. 380. 22. If a Writ of Error be brought to reverſe a Recovery by Default in a real Action, and the Error aſſigned be Nonage of the Plaintiff in Error at the Time of ſuffering the Recovery, the Queſtion, whether he be of full Age, is to be tried by the Court upon Inſpection.

1 Sid. 322. Raby v. Robinſon. 1 Lev. 142. 23. But if a Recovery have been ſuffered againſt the Attorney of a Perſon, and, upon a Writ of Error brought to reverſe it, the Error aſſigned be Nonage of the Plaintiff in Error at the Time of making the Warrant of Attorney, the Queſtion, whether he be of full Age is to be tried by a

a Jury;

a Jury; Becauſe, the making of the Letter of Attorney was an Act in *Pais*.

24. If an *Audita Querela* be brought to avoid a Recognizance, becauſe it was entered into during the Nonage of the Plaintiff, the Queſtion, whether he be of full Age, is to be tried by the Court upon Inſpection. 10 Rep. 43. Mary Portington's Caſe. Carth. 278, 279.

25. It is laid down in one Book, that if in an Action of Account Iſſue be joined upon the Plea of Infancy, the Queſtion, whether the Defendant be of full Age, is to be tried by the Court upon Inſpection. 2 Roll. Abr. 572. pl. 9.

26. But it is in another Book laid down, that the Queſtion, whether a Perſon be of full Age, is always to be tried by a Jury, unleſs the Validity of a judicial Act depend upon the Queſtion. 1 Inſt. 380.

27. In an Appeal of Maihem the Court may, at the Prayer of the Defendant, try upon Inſpection of the Part, whether there be a Maihem. Bro. Appeal, pl. 46. Bro. Trial, pl. 57. 2 Hawk. Pl. C. 160.

28. As the Court have a Power, in Caſe the Defendant in an Appeal of Maihem pray it, to try upon Inſpection of the Part whether there be a Maihem, the Plaintiff in an Appeal muſt always appear in Perſon, that the Court may have an Opportunity, in caſe it ſhould be ſo tried, of inſpecting the Part. Bro. Trial, pl. 57. 2 Hawk. pl. C. 160.

29. If where the Trial is by the Court upon Inſpection, there be a Doubt upon inſpecting, the Court has a Power of requiring or receiving other Evidence. 2 Roll. Abr. 573. pl. 2.

30. If the Queſtion whether *J. S.* be of full Age is tried by the Court upon Inſpection, *J. S.* may at the Time of Inſpection be examined by the Court upon a *Voire dire* concerning his Age. Ibid.

31. An *Audita Querela* being brought to avoid an Execution upon a Recognizance, and the Age of the Recognizor being tried by the Court upon Inſpection, the Court examined his Mother and another Witneſs concerning the Age of the Party inſpected; who both ſwore that he was not of full Age. The Court, being ſtill doubtful, ordered a Copy of the Regiſter of the Pariſh where he was born to be produced. Carth. 278, 279. Lloyd *v.* Eagle. 2 Roll. Abr. 573. pl. 4.

32. If the Court upon inſpecting the Part in an Appeal of Maihem be doubtful whether there be a Maihem, a Writ may be awarded to the Sheriff, to return ſome able Phyſicians and Surgeons for the better Information of the Court. Bro. Appeal, pl. 46. Bro. Trial, pl. 57. 2 Hawk. Pl. C. 160.

33. If the Court after having inſpected and receiving other Evidence be ſtill doubtful, it has a Power of refuſing to determine the Matter in Queſtion, and may ſend it to be tried by a Jury. Bro. Trial, pl. 60.

3. Upon the Examination of Witneſſes.

34. Every Queſtion, which ariſes upon a Challenge to the Array of the Jury, is to be tried by the Court upon the Examination of Witneſſes; for unleſs every ſuch Queſtion, although it depend upon a Matter of Fact, be ſo tried, there would be a Delay of Juſtice. 9 Rep. 32. Abbot of Strata Marcella's Caſe.

35. If a Queſtion ariſe, whether a Piece of written Evidence were delivered by one of the Parties to the Jury after they went from the Bar, it is to be tried by the Court upon the Examination of Witneſſes. Cro. Eliz. 616. Graves *v.* Short.

36. The

9 Rep. 30. Abbot of Strata Marcella's Caſe. Bro. Exam. pl. 35.

36. The Defendant pleaded, that the Plaintiff who had appeared by Attorney was dead. Hereupon a Perſon came into Court, and ſaid he was the Plaintiff. This being denied by the Defendant, it was holden to be a proper Queſtion for the Determination of the Court upon the Examination of the Attorney, whether this were the Perſon for whom he had appeared.

Bro. Trial, pl. 36. 9 Rep. 30.

37. If in a Writ of Dower the Iſſue be, whether the Huſband of the Woman claiming Dower be living, the Iſſue is to be tried by the Court upon the Examination of Witneſſes.

Bro. Trial, pl. 90. 9 Rep. 30.

38. If an Appeal be brought by a Woman of the Death of her Huſband, and the Defendant plead that the Huſband is living, and Iſſue be thereupon joined, the Iſſue is to be tried by the Court upon the Examination of Witneſſes.

2 Roll. Abr. 578. pl. 13. pl. 14. pl. 15.

39. If a Queſtion ariſe concerning a Fact ſuggeſted to have been done beyond the Seas, it is to be tried by the Court upon the Examination of Witneſſes; for a Jury cannot be ſuppoſed to have any Knowledge either of the Fact, or of the Witneſſes who may be adduced to prove it.

Bro. Trial, pl. 60.

40. If upon a Trial by the Court of a Queſtion of Fact upon the Examination of Witneſſes the Court be doubtful, it has a Power, provided it be not ſuggeſted that the Fact was done beyond the Seas, of ſending the Queſtion to be tried by a Jury.

(B) Of a Trial by a Record.

9 Rep. 30. Abbot of Strata Marcella's Caſe. 1 Inſt. 117. Jenk. Cent. 99.

1. EVERY Queſtion ariſing in a Cauſe concerning a Matter of Record, is to be tried by the Record; becauſe a Record does in itſelf import ſuch Verity, that an Averment contrary thereto is not to be received. The receiving of ſuch Averment would moreover be attended with great Inconvenience; for if one Averment could be received to contradict a Record, another might be received to contradict the ſecond Record, and ſo it might go on *ad Infinitum*.

Bro. Trial, pl. 40. 2 Roll. Abr. 574.

2. If an Iſſue be joined upon the Plea of *Nul tiel* Record, it is to be tried by the Record.

Trial per Pais 15.

3. If a Queſtion ariſe concerning a Privilege claimed by a City or Borough under a Charter, it is to be tried by the Record of the Charter.

Str. 76. Forſter *v.* Cale. Bro. Trial pl. 6. Lord Raym. 1173.

4. The Queſtion, whether a Man be an Attorney of a Court, is to be tried by the Record in which the Attornies of the Court are inrolled.

Hob. 244. Peter *v.* Stafford.

5. The Queſtion, whether an Original Writ were ſued out, is to be tried by a Jury: Becauſe the Writ is not recorded, until a Return be made thereto.

Cro. Eliz. 131. Hoe *v.* Marſhal. Ibid.

6. If the Queſtion be general, whether a Defendant did appear, it is to be tried by the Record: Becauſe the Appearance ought to be entered upon the Record.

7. But if the Queſtion be, whether a Defendant did appear at a Day certain, it is to be tried by a Jury: For it is not neceſſary, that the Day of Appearance ſhould be entered upon the Record.

8. If

8. If the Queſtion be, whether a Perſon were rendered at a Day certain in Diſcharge of his Bail, it is to be tried by the Record: Becauſe the Day of the Render ought to be entered upon the Record. Hob. 210. Welby *v.* Canning.

9. If the Queſtion be, whether a Deed be inrolled, it is to be tried by the Record of Inrolment. 4 Rep. 71. Hynde's Caſe.

10. But if the Queſtion be, at what Time a Deed was inrolled, it is to be tried by a Jury; becauſe it is not neceſſary, nor was it formerly the Practice, to mention the Time of inrolling a Deed. 4 Rep. 71. Hynde's Caſe. 2 Roll. Rep. 219.

11. If the Queſtion be, whether *J. S.* were Sheriff of the County of *A.* it is to be tried by the Record: becauſe every Sheriff is appointed by Letters Patent, which are always recorded. 9 Rep. 31. Abbot of Strata Marcella's Caſe.

12. But if the Queſtion be, whether *J. N.* were Under-Sheriff to *J. S.* it is to be tried by a Jury; for the Appointment of an Under-Sheriff is never recorded. Bro. Trial. pl. 113.

13. If a Sheriff, after having returned a *Cepi corpus*, plead to an Action of Eſcape, that the Party never was in his Cuſtody, the Queſtion, whether the Party was ever in the Sheriff's Cuſtody, is to be tried by the Record of the Return. 2 Roll. Abr. 574. pl. 7.

14. But if a Sheriff, who did arreſt *J. S.* return *non eſt inventus*, the Queſtion, whether *J. S.* were arreſted, is to be tried by a Jury: Becauſe it depends upon the Truth of the Return, and not upon the Import thereof. 2 Roll. Abr. 574. pl. 8.

15. If a Man juſtify the having done a Thing as a Juſtice of the Peace, the Queſtion, whether he were a Juſtice of the Peace, is to be tried by the Record of the Commiſſion of Peace. 2 Roll. Abr. 574. pl. 9.

16. If the Queſtion be, whether a Perſon have a Right to a Peerage under a Writ, it is to be tried by the Record of the Writ: But if the Queſtion be, whether a Perſon have a Right to a Peerage by Deſcent, it is to be tried by a Jury: For it can never appear from the Record, that the Perſon claiming the Peerage is deſcended from the Perſon who was firſt created a Peer. Ld. Raym. 14. Rex *v.* Knollys. 12 Mod. 57.

17. If a Matter of Record be alledged meerly by Way of Inducement to a Matter of Fact, the Trial is to be by a Jury; for the Queſtion in ſuch Caſe is not concerning a Matter of Record. Palm. 524. Bigg *v.* Wharton.

18. If a Queſtion ariſe concerning a Decree of the Court of Chancery, it is to be tried by a Jury; the Court of Chancery, *quatenus* a Court of Equity not being a Court of Record. Trial per Pais 156.

19. If a Record be pleaded, and an Iſſue be joined upon the Plea of *Nul tiel* Record, a Day is given to bring in the Record. Bro. Fail. of Record, pl. 2.

20. If the Record be a Record of the Court in which it is pleaded, and it be not brought in at the Day, this is a Failer of Record: Becauſe it was in the Power of the Party to bring it in. Ibid.

21. If the Record pleaded be a Record of a ſuperior Court, and it be not brought in at the Day, this is a Failer of Record: Becauſe, as a *Certiorari* could not be ſent from the Court in which it is pleaded for removing the Record of a ſuperior Court, it was incumbent upon the Party who pleaded the Record to bring it in. It was moreover in his Power, to remove the Record by a *Certiorari* into the Court of Chancery, and afterwards to bring it by a *Mittimus* from the Court of Chancery into the Court in which it is pleaded. Bro Fail. of Record, pl. 3.

22. But if the Record of an inferior Court be pleaded, and a *Certiorari* have been ſued out from the Court in which it is pleaded to the inferior Court, and the Record be not returned at the Day, this is not a Failer of Record; becauſe the Party who pleaded the Record has not been guilty Ibid.

of

of Neglect: But it is his Duty to ſue out an *alias Certiorari*, and afterwards a *Pluries*, and ſo to continue the Proceſs, until the Record is returned.

Bro. Fail. of Record, pl. 4. 23. Although ſome Part of the Record pleaded be not ſet out, this is not a Failer of Record; for it is not neceſſary, that any more ſhould be ſet out by the Party who has pleaded a Record than is material for him.

Ibid. 24. If a Man plead a Record of a Recovery of one Acre, and the Record brought in is of a Recovery of two Acres, this is not a Failer of Record; for if two Acres were recovered one certainly was.

Ibid. 25. If a Man declare upon a Recognizance of *J. S.* and it appear from the Record brought in, that *J. S.* and *J. N.* were jointly and ſeverally liable for the whole Sum mentioned in the Recognizance, this is not a Failer of Record: It being ſufficient to ſhew, that *J. S.* was liable for the whole Sum mentioned in the Recognizance.

26. A Variance in the Record brought in from the Record pleaded, in an immaterial Part, is not a Failer of Record.

Bro. Fail. of Record, pl. 1. 27. If a Record of Outlawry of the Plaintiff at the Suit of *J. S.* be pleaded, and the Record brought in be of Outlawry of the Plaintiff at the Suit of *J. N.* this is not a Failer of Record; for the material Queſtion is, whether there be a Judgment of Outlawry of the Plaintiff, and not at whoſe Suit the Judgment was.

Hob. 179. Coachman v. Halley. 28. If the Record brought in vary from the Record pleaded as to a Continuance, this is not a Failer of Record; the Continuance not being a material Part of the Record.

29. But a Variance in the Record brought in from the Record pleaded, in a material Part, is a Failer of Record.

1 Barn. 333. Eggleton v. Seneff. 30. If a Man plead a Record of a Recovery againſt him by the Name of *Curphey*, and the Record brought in be of a Recovery againſt a Perſon of the Name of *Scurfee*, this is a Failer of Record: Becauſe it does not appear to be a Recovery againſt the ſame Perſon.

Bro. Fail. of Record, pl. 11. 31. And for the ſame Reaſon, if a Record of Outlawry of the Plaintiff by the Name of *J. S.* Knight be pleaded, and the Record brought in be of Outlawry of the Plaintiff by the Name of *J. S.* Eſq; this is a Failer of Record.

Dyer 187. 32. If the Record of Outlawry brought in vary from the Record of Outlawry pleaded, as to the Day of the Return of the *Exigent*, this is a Failer of Record, the Day of the Return of the *Exigent* being material.

Hob. 209. Parry v. Paris. Hardr. 200. 33. But if a Record of one Day of a Term be pleaded, and a Record of another Day of the ſame Term be brought in, this is not a Failer of Record: Becauſe, as a whole Term is but one Day in the Eye of the Law, the Variance is not material.

Bro. Fail. of Record, pl. 16. 34. If however the State of the Pleadings be ſuch, that the Party, who has pleaded a Record, ought to ſhew the preciſe Day of the Term of which is, and the Record brought in be of a different Day, this is a Failer of Record; notwithſtanding it be a Record of the ſame Term.

Bro. Fail. of Record, pl. 2. 35. The Conſequence of a Failer of Record is, that Judgment is given againſt the Party who pleaded the Record.

(C) Of a Trial by a Certificate.

1. IT is in the general true, that if a Queſtion ariſe in a temporal Court, concerning a Matter which is only triable in a ſpiritual Court, it muſt be tried by the Certificate of the Ordinary.

2. And

2. And ſuch Queſtion cannot be tried by the Certificate of a Deputy to the Ordinary, unleſs the Ordinary be out of the Realm in the King's Service. 8 Rep. 68, 69. Trollop's Caſe. 1 Inſt. 134. Bro. Certif. de Eveſque, pl. 30.

3. But if a Biſhoprick be vacant, a Queſtion which is triable only in the Biſhop's Court, may be tried by the Certificate of the Guardian of the Spiritualties. 2 Roll. Abr. 590. Z. pl. 2.

4. If a Matter which is only triable in a Spiritual Court be pleaded in Abatement of an Action in a Temporal Court, it is not to be tried by the Certificate of the Ordinary: Becauſe ſuch Trial would not in this Caſe be peremptory. Bro. Certif. de Eveſque, pl. 22. 2 Roll. Abr. 588. pl. 3.

5. The Queſtion, at what Time an Act, which is only triable in a Spiritual Court, was done, is not in the general to be tried by the Certificate of the Ordinary. 2 Show. 53. Hill v. Boomer.

6. But if the Time of doing an Act, which is only triable in a Spiritual Court, be material, ſuch Queſtion is to be tried by the Certificate of the Ordinary. 2 Show. 53. Hill v. Boomer. Noy 111.

7. If a Queſtion ariſe in a temporal Court concerning Special Baſtardy; namely whether *J. S.* was born before his Father and Mother were married, it is not to be tried by the Certificate of the Ordinary; Becauſe the Marriage being admitted, the Queſtion concerning the Time of Birth of *J. S.* may be properly tried in the Temporal Court. Bro. Baſt. pl. 17. pl. 29.

8. It was formerly holden, that if a Queſtion aroſe in a temporal Court concerning General Baſtardy; namely whether the Father and Mother of *J. S.* were married, it was in the general to be tried by the Certificate of the Ordinary: Becauſe a Queſtion concerning the Validity of a Marriage can be only tried in a Spiritual Court. Bro. Baſt. pl. 9. pl. 17. pl. 29.

9. But it was at the ſame Time holden, that if the Queſtion did not ariſe before the Death of the Perſon whoſe Legitimacy was in Queſtion, it might be tried in a Temporal Court. Bro. Baſt. pl. 3. pl. 9.

10. And it has been for many Years holden, that the Queſtion, whether there has been a Marriage in Fact, is in all Caſes triable in a Temporal Court; for that the Certificate of the Ordinary is never neceſſary, unleſs the Queſtion be whether the Father and Mother were lawfully married. 1 Show. 50. Allen v. Grey. Salk. 437. Bro. Baſt. pl. 9.

11. It follows, that as the Plea of *Ne unques accouple in Loyal Matrimonie*, which is the only Plea whereby the Lawfulneſs of a Marriage can be put in Iſſue, is only to be pleaded in a real Action; the Certificate of the Ordinary is not at this Day neceſſary in a perſonal or mixed Action. Salk. 437. 1 Lev. 41.

12. In Action of Debt upon a Bond, conditioned for the Payment of a Sum of Money to the Plaintiff upon the Day of his Marriage, the Defendant pleaded *Ne unques Loyalement marrie*. Iſſue being joined upon this Plea, there was a Verdict for the Plaintiff. In Arreſt of Judgment it was inſiſted, that the Lawfulneſs of the Marriage ought not to have been tried by a Jury. But by the Court—The material Part of this Iſſue is married or not. The Plaintiff might have demurred to the Defendant's Plea, on Account of the Word *Loyalement* being therein contained. As he did not demur but pleaded to Iſſue, and as this is a perſonal Action, wherein the Lawfulneſs of a Marriage cannot properly come in Queſtion, the Trial was well enough. 1 Lev. 41. Baſſet v. Morgan. Bro. Baſt. pl. 9. Salk. 437.

13. If a Queſtion ariſe in a Temporal Court, whether *J. S.* be under a Sentence of Excommunication, it is to be tried by the Certificate of the Ordinary. 1 Inſt. 133.

Bro. Trial. pl. 31. pl. 53. 14. If a Queſtion ariſe in a Temporal Court, whether *J. S.* be divorced from his Wife, it is to be tried by the Certificate of the Ordinary.

Cro. Eliz. 789. Baker *v.* Rogers. 2 Roll. Abr. 591. 15. Wherever the Certificate of the Ordinary is neceſſary to the Trial of a Queſtion in a Temporal Court, it is alſo neceſſary, that the Certificate be poſitive as to the Fact certified: Becauſe the Temporal Court cannot determine upon any ſpecial Matter therein contained.

1 Barn. 1. Eaſterly *v.* Eaſterly. 16. In an Action of Dower Iſſue was joined upon the Plea of *Ne unques accouple in Loyal Matrimonie.* The Ordinary being written to by the Court, he certified the Evidence adduced before him to prove the Lawfulneſs of the Marriage: But he did not certify poſitively that the Parties were lawfully married. Upon a Motion as of Courſe for Judgment for the Demandant the Court refuſed to give Judgment; and ſaid it might be moved upon Notice of Motion to the Tenant, who would then have an Opportunity of objecting to the Sufficiency of the Certificate. The Certificate was afterwards amended by returning the Fact inſtead of the Evidence; and Judgment was given for the Demandant.

Bro. Baſt. pl. 35. 2 Roll. Abr. 591. pl. 4. pl. 6. 17. But if the Certificate be poſitive as to the Fact certified, it is ſufficient, notwithſtanding the Evidence upon which the Ordinary founded his Opinion be therein contained; inaſmuch as, this is to be rejected as Surpluſage.

Cro. Car. 351. Wickham *v.* Enfield. 2 Roll. Abr. 591. pl. 3. 18. It is not neceſſary for the Ordinary, who certifies that two Parties were joined together in lawful Matrimony, to mention the Day or Place of the Marriage: Becauſe his Certificate, provided it be poſitive as to the Fact certified, is concluſive.

1 Inſt. 74. 2 Roll. Abr. 579, 580. 19. If a Queſtion ariſe concerning the Exiſtence of a Cuſtom of the City of *London*, it may in the general be tried by the Certificate of the Mayor and Aldermen.

1 Inſt. 74. Bro. Trial, pl. 96. 20. But unleſs the Party, who deſires to have a Queſtion concerning the Exiſtence of a Cuſtom of the City of *London* tried by Certificate, ſurmiſe, that when Parties have been at Iſſue concerning the Exiſtence of ſuch a Cuſtom, it has been uſual to try the Iſſue by the Certificate of the Mayor and Aldermen, the Queſtion is not to be ſo tried.

1 Inſt. 74. 2 Roll. Abr. 579. 21. The Certificate of the Mayor and Aldermen of the City of *London*, concerning the Exiſtence of a Cuſtom of this City, is not to be ſent in Writing; but is to be delivered at the Bar of the Court by the Mouth of the Recorder.

2 Roll. Abr. 580. pl. 5. 22. If a Queſtion ariſe, whether there be a Cuſtom of the City of *London*, that every Man may deviſe Land lying therein, it may be tried by the Certificate of the Mayor and Aldermen.

2 Roll. Abr. 580. pl. 3. 23. If in an Action of Debt upon Bond the Defendant plead a foreign Attachment in *London* by Virtue of a Cuſtom of this City, and Iſſue be joined upon the Exiſtence of the Cuſtom, it may be tried by the Certificate of the Mayor and Aldermen.

2 Jon. 149. Leather Sel. Comp. *v.* Beacon. 24. An Action of Debt was brought upon a By-Law, which ordained, that every Perſon elected to the Livery of a certain Company ſhould pay Twenty-five Pounds for the Uſe of the Company. The Defendant pleaded a Cuſtom of the City of *London*, that no Perſon is capable of being elected to the Livery of any Company, unleſs he is a Freeman of this City, and that he is not a Freeman thereof. The Plaintiff in his Replication denied the Exiſtence of the Cuſtom, and concluded with an Averment. The Defendant demurred, becauſe the Plaintiff had not concluded to the Country. It was holden, that the Concluſion was right; for that the Exiſtence of

of the Cuſtom may be tried by the Certificate of the Mayor and Aldermen.

25. But if the Mayor and Aldermen are intereſted in the Cuſtom, concerning the Exiſtence of which the Queſtion ariſes, it is to be tried by a Jury. Hob. 85. Day v. Savage.

26. In an Action of Treſpaſs for taking the Plaintiff's Goods, the Defendant pleaded a Cuſtom of the City of *London*, that if any Perſon, not having a Shop in this City, carry Goods about the ſame to ſell, he ſhall forfeit the Goods to the Mayor, Citizens and Commonalty, and that it ſhall be lawful for any Freeman to ſeize them for the Uſe of the Mayor, Citizens and Commonalty; and that he being a Freeman did ſeize them by Virtue of the Cuſtom. Iſſue being joined upon the Exiſtence of the Cuſtom, it was tried by the Certificate of the Mayor and Aldermen. The Trial was adjudged a Miſ-Trial, and the Iſſue was afterwards tried by a Jury. And by the Court—The Exiſtence of a Cuſtom, in which the Mayor and Aldermen of *London* are intereſted, is not fit to be tried by their Certificate: For no Man ought to be a Judge in his own Cauſe. 2 Roll. Abr. 581. pl. 3.

27. The Defendant in an Action pleaded, that the Mayor, Citizens and Commonalty of the City of *London* were entitled to a certain Sum of Money for Wharfage, from the Owner of every Boat brought into *Queenhithe*. The Plaintiff replied, that every Freeman was by a Cuſtom of this City exempted from the Payment of the Wharfage. Iſſue being joined upon the Exiſtence of the Cuſtom, it was holden after Argument and long Debate, that the Iſſue ought not to be tried by the Certificate of the Mayor and Aldermen; becauſe they are intereſted in the Queſtion, but by a Jury. Moor 871. Day v. Savage. 2 Roll. Abr. 579. pl. 2.

28. If a Queſtion ariſe, whether an original Writ ought to bear *Teſte* on the Day it was beſpoken at the Curſitor's Officer, or upon the Day it was ſealed, it is to be tried by the Certificate of the Principal and Aſſiſtants of the Curſitor's Office. 1 Will. 438. Price v. The Hundred of Chewton.

(D) Of a Trial by a Jury.

1. IT is in the general true, that every Queſtion of Fact ariſing in a Cauſe is to be tried by a Jury.

2. And in divers Caſes wherein a Queſtion of Fact may be otherwiſe tried, it is, as under the foregoing Heads has been ſhewn, in the Diſcretion of the Court to ſend it to be tried by a Jury. Bro. Trial, pl. 60. Bro. Appeal, pl. 47.

3. If a new Offence be created by a Statute, and the Statute be ſilent as to the Manner of its being tried, the Trial thereof is to be by a Jury; this Manner of Trial being agreeable to *Magna Charta*. 7 Mod. 99. Reg v. Sturmey.

4. As the Queſtion, whether there ought to be a Common Council in a Corporation, conſiſting of a certain Number of Perſons, muſt always depend upon a Queſtion of Fact, namely whether there have been an Uſage in the Corporation to have ſuch Common Council, it is a proper Queſtion for the Determination of a Jury. Sayer 37. Rex v. The Mayor and Burgeſſes of Nottingham.

5. If a Queſtion do not depend upon an Act alone, but upon an Act as being coupled with a certain Intent, the Intent as well as the Act muſt be tried by a Jury: Becauſe the Intent is in ſuch Caſe the material Thing, and the Jury muſt judge thereof in the beſt Manner they are able from the Circumſtances which attended the Act. 1 H. H. P. C. 229.

Bro. Iſſue, pl. 45. 6. If the Iſſue be, whether a Tenant chaſed his Beaſts from a Manor, after the Lord who came to diſtrain had ſeen them upon the Manor, with an Intent to prevent their being diſtrained, the Intent muſt be tried by a Jury.

Bro. Iſſue, pl. 22. 1 H. H.P.C. 229. 7. If the Iſſue in an Information be, whether the Intent of the Defendant was to carry Wool, which had been by him put on Board a Ship, to *Calais*, the Intent muſt be tried by a Jury.

Hob. 217. Crookhay *v.* Woodward. Hob. 93. 5 Rep. 108. Sid. 313. Cro. Ja. 381. 8. If an Agreement be, that a certain Fact ſhall be proved, it muſt be proved to a Jury: This being the legal Way of proving a Matter of Fact.

Hob. 217. Crookhay *v.* Woodward. 5 Rep. 108. Sid. 313. Hob. 93. 9. But if a particular Manner of proving a certain Fact have been agreed upon, it muſt be proved in the Manner agreed upon.

3 Lev. 241. Beayne *v.* Beal. 10. If an Agreement be, that a certain Fact ſhall be proved before *J. S.* it is to be proved by Witneſſes to be examined by *J. S.*

Cro. Ja. 381. Sid. 313. 11. And although an Agreement be in general Terms, that a certain Fact ſhall be proved; yet if it appear clearly, from any Circumſtance attending the Agreement, that the Parties did not intend a Proof to a Jury, the Fact may be otherways proved.

Cro. Ja. 381. Gold *v.* Death. 12. If an Agreement be, that a certain Fact ſhall be proved in two Days, it is not neceſſary that it ſhould be proved to a Jury; for, as a Trial by a Jury can never be had within ſo ſhort a Space of Time as two Days, ſuch Trial could not have been intended.

Lutw. 665. Ladd *v.* Garrod. 13. The Condition of a Bond dated the 23d Day of *Auguſt* was, that the Obligor ſhould pay to the Obligee Ten Shillings, for every twenty Shillings which the Obligee ſhould by ſufficient Proof make appear that *J. S.* was indebted to him; and that one half of the ſame ſhould be paid on or before the 25th Day of *November* then next enſuing. An Action of Debt being brought upon the Bond the Defendant pleaded, that the Plaintiff did not make it appear by ſufficient Proof, that *J. S.* was indebted to him in the Sum of twenty Shillings. The Plaintiff replied, that before the ſaid 25th Day of *November* he and *J. S.* ſettled an Account, by which *J. S.* acknowledged himſelf to be indebted to the Plaintiff in the Sum of 31*l.* Upon a Demurrer to the Replication it was inſiſted, that the Proof of the Debt ought to have been made to a Jury: But it was holden, that ſuch Proof could not have been intended: Becauſe a Trial by a Jury could not have been had, before the Time limited for the Payment of the Money muſt have expired.

14. If it be neceſſary, that a Fact ſhould be proved to a Jury, it is not neceſſary, that it ſhould be proved in a previous Action.

Moor 845. Griffin's Caſe. 2 Leon 215. 15. A Promiſe was made by *J. S.* to pay *J. N.* Three Pounds, upon his proving that a certain Cock won his Battle. An Action being brought for the Money, *J. S.* pleaded that this had not been proved. The Plea was holden to be bad. And by the Court—It was not neceſſary to prove this before the bringing of the preſent Action; for it may be proved at the Trial thereof.

Cro. Ja. 188. Aldred *v.* Mathew. 16. A Penalty was given by a Statute, upon its being proved by two Witneſſes, that a certain Thing thereby prohibited had been done. In an Action of Debt for the Penalty the Queſtion was, whether it were neceſſary to prove the Offence by two Witneſſes in a previous Action, before

fore an Action could be brought upon the Statute. It was holden not to be neceſſary; for that this may be proved in the Action upon this Statute.

(E) Of a Trial at Bar.

1. BY the Statute of Second *Weſtminſter*, *c.* 30. Trials at Bar, which were before had in all Cauſes, are confined to ſuch Cauſes, as by Reaſon of the Greatneſs and Variety of the Matters in Queſtion require a more ſolemn Examination.

2. A Trial at Bar cannot be had without the Leave of the Court, although both Parties deſire to have a Cauſe tried at Bar. 2 Lill. Abr. 741. Str. 696.

3. It is laid down in one Book, that unleſs it appear, that the Matter in Queſtion is of conſiderable Value, and that ſome difficult Queſtion will probably ariſe at the Trial of the Cauſe, the Court ought not to grant a Trial at Bar. 1 Barnard. 141. Goodright *v.* Wood.

4. The Eſtate in Queſtion was of the Value of 3000*l.* a Year; yet the Court refuſed to let an Action of Ejectment be tried at Bar: Becauſe, as the Leſſor of the Plaintiff claimed under the Defendant, it did not appear, that any Thing more would be neceſſary than to prove the Execution of a Conveyance. Salk. 648. Lord Sandwich's Caſe.

5. But it is in other Books laid down, that the granting of a Trial at Bar is diſcretionary in the Court. 2 Lill. Abr. 741. Str. 696.

6. Trials at Bar were granted in two modern Caſes, although it did not appear, that any difficult Queſtion would ariſe at the Trial of either of the Cauſes: Becauſe the Matters in Queſtion were of great Value. Str. 52, 479.

7. In another Caſe the Court granted a Trial at Bar at the Inſtance of the Defendant; becauſe the Plaintiff had laid his Damages at 50,000*l.* although it did not appear, that any difficult Queſtions would ariſe at the Trial of the Cauſe. 1 Barn. 320. Lord Hilſborough *v.* Jefferies.

8. And in another Caſe the Court granted a Trial at Bar, although the Matter in Queſtion was very inconſiderable; becauſe it appeared, that the Examination would be difficult. Str. 644. Rex *v.* Johnſon.

9. It has been holden, that, in order to induce the Court to grant a Trial at Bar, the particular Value or Difficulty of the Cauſe muſt be ſhewn; for that it is not enough to ſwear generally to Value or Difficulty. 1 Barnard. 141. Goodright *v.* Wood.

10. It was ſworn in order to obtain a Trial at Bar, that the Examination was expected to be long and difficult, and that the Matter in Queſtion was of great Value. A Trial at Bar was refuſed. And by the Court—It is very eaſy to alledge generally, that there is Value in a Cauſe, or that the Examination is expected to be long and difficult: But the Court ought not to grant a Trial at Bar, unleſs the particular Value or Difficulty be ſhewn; becauſe Trials at Bar are very expenſive, and the granting of many would prevent the Court from diſpatching the Buſineſs of other Suitors. Sayer 79. Rex *v.* Burgeſſes of Carmarthen

11. It was ſaid by *Pratt* Ch. J. that the moſt proper Caſe for granting a Trial at Bar is, where it is likely, that a Queſtion of Law will ariſe, and that this will be ſo complicated with a Queſtion of Fact, that the whole Matter muſt be determined by the Jury under the Direction of the MS. Rep. Whitaker *v.* Burrough, Trin. 4 G. 3. in C. B.

the Court: For that, how difficult ſoever the Queſtion of Law which is likely to ariſe may appear to be, if it be not complicated with a Queſtion of Fact, there is no Neceſſity to grant a Trial at Bar; becauſe the Queſtion of Law may be reſerved for the Conſideration of the Court.

Str. 696. The Caſe of the Borough of Chriſt Church. 12 Mod 331.

12. It is in the general true, that the Court will not grant a Trial at Bar before an Iſſue is joined; becauſe the Court cannot judge, before it is known what the Iſſue is, of the Propriety of trying it at Bar.

2 Barn. 365. Roe on the Demiſe of Cholmondly.

13. But in an Action of Ejectment the Court will grant a Trial at Bar before Iſſue is joined: Otherwiſe it would generally be in the Defendant's Power, to prevent the Plaintiff's moving for a Trial at Bar; Iſſue being ſeldom joined in ſuch Action, until the Opportunity of moving for a Trial at Bar is paſt.

Sayer 155. Anon.

14. A Motion being made for a Trial at Bar, before Iſſue was joined in the Action, the Court refuſed to make a Rule to ſhew Cauſe. And by *Ryder* Ch. J.—It is contrary to the Practice of the Court to grant a Trial at Bar in any Action, except an Action of Ejectment, before Iſſue is joined.

Sa'k. 644. 2 Lill. Abr. 741. Str. 856.

15. If the *Venue* in an Action be laid in *London*, the Court cannot order it to be tried at Bar; becauſe the doing of this would be contrary to a Charter, by which the Citizens of *London* are exempted from ſerving as Jurors out of the City of *London*.

2 Lill. Abr. 750.

16. And it is ſaid, that if the *Venue* in an Action be laid in *Briſtol*, the Court cannot for the ſame Reaſon order it to be tried at Bar.

2 Roll. Abr. 629. Fitz. N. B. 241.

17. If a Civil Cauſe be carried on in the Name of the King it muſt always be tried at Bar, unleſs there be a ſpecial Warrant for granting a Writ of *Niſi prius*; becauſe the Statute of *Niſi prius* does not extend to the King.

Bro. Niſi prius pl. 35. 2 Inſt. 424. Salk. 651.

18. The Attorney General may pray a Trial at Bar in any Civil Cauſe wherein the King is intereſted; for, as the Statute of *Niſi prius* does not extend to him, the King has a Right to try every Civil Cauſe in which he is intereſted at Bar.

Salk. 625. Ld. Bellamont's Caſe.

19. A Trial at Bar was granted at the Prayer of the Attorney General in an Action againſt the Governor of *New York*, for ſomething done by him as Governor: Becauſe the Action was defended at the Expence of the King.

Salk. 651. Sir Samuel Aſtry's Caſe.

20. The Attorney General cannot prevent the Trial of a Civil Cauſe in which the King is intereſted at Bar; for although he may, if the King be intereſted in a Civil Cauſe, always pray a Trial at Bar, it does by no Means follow, that he ſhould have a Power to deprive a Subject of the Right of trying a Cauſe at Bar, which is proper to be tried there.

1 Ventr. 74. Anon.

21. The Court will not in the Caſe of an Indictment or Information grant a Trial at Bar at the Prayer of the Attorney General, unleſs the Proſecution be carried on at the Expence of the Crown; for, if the Proſecution be carried on at the Expence of a Subject, the King is not to be conſidered as concerned in Point of Intereſt, notwithſtanding the Proſecution is carried on in his Name.

Str. 816. Rex v. Hales.

22. The Attorney General prayed, that an Information for Perjury filed by him *ex Officio* might be tried at Bar: But the Court refuſed to grant ſuch Trial; becauſe he did not alledge, that the Proſecution was carried on at the Expence of the Crown. And by the Court—As this does not appear to be the Caſe, the uſual Requiſites for a Trial at Bar muſt be laid before the Court by Affidavit. The Attorney General, having afterwards received Orders from the King to proſecute, did at another Day again pray a Trial at Bar; which was granted.

23. The

23. The Court of King's Bench may grant a Trial at Bar in an Information for a Misdemeanor at the Prayer of the Defendant. Str. 52. Rex v. Toley.

24. A Person of good Character being apprehended by a Hundred for a Robbery, and there being Reason to suspect, that the Prosecution would be carried on with great Rigour, for the Sake of discharging the Hundred by his Conviction, a Trial at Bar was moved for. It was not granted in this Case, because the Motion was made before a Bill of Indictment was found: But it was said by *Holt* Ch. J. that it had been usual to grant a Trial at Bar in an Indictment at the Prayer of the Defendant. 12 Mod. 331. Rex v. Thompson.

25. The Court of King's Bench may grant a *Habeas Corpus* for bringing a Felon to be tried at Bar, although the Felony was not committed in the County of *Middlesex*; if it appear, that there will not be a Gaol Delivery at the usual Time, in the County in which the Felony was committed. 2 Lill. Abr. 746.

26. It is said, that an Action of Debt for not setting out Tithes being brought by Sir *William Morton*, one of the Justices of the Court of Common Pleas, a Trial at Bar was moved for, which was granted without any Affidavit. And by the Court—If one of the Judges or a Master in Chancery be a Party, the Cause, however small the Value of the Matter in Question is, may at the Prayer of such Party be tried at Bar. 1 Sid. 407. Morton v. Hopkins.

27. In another Case it is said, that a Trial at Bar is never refused, if it be prayed by an Officer of the Court, or a Gentlemen at the Bar, who is a Party to the Suit. Salk. 651. Sir Samuel Astry's Case.

28. But it is doubtful, whether either of these Cases be at this Day Law; for in a very late Case, in which a Trial at Bar was moved for by the Defendant a Serjeant at Law, his Pretension to a Trial at Bar on Account of being a Serjeant at Law was not much relied upon, and a Trial at Bar was granted upon another Ground. MS. Rep. Whitaker v. Burrough. Trin. 4 G. 3. in C. B.

29. The Court may grant a Trial at Bar at the Instance of a Person who sues *in forma pauperis*. 12 Mod. 318. Anon.

30. A Trial at Bar being moved for by the Defendant, it was refused, because the Plaintiff was poor; unless the Defendant would consent to take *Nisi prius* Costs, in case he should obtain a Verdict. Salk. 648. Anon.

31. The Court will not grant a Trial at Bar in an Action of Ejectment; unless a Plaintiff sufficient to answer for Costs be named. 12 Mod. 318. Sherwin v. Sir Thomas Clarges.

32. A Trial at Bar was refused; because the Party moving for it had not paid the Costs of a former Trial, at which there was a Verdict against her. 1 Vent. 64. Lady Baltinglass's Case.

33. A Motion being made, that a Cause might be tried at Bar in the same Term it was moved for, upon a Suggestion that the Defendant would the next Term be entitled to Privilege, it was objected, that it had not been usual to grant a Trial at Bar in the Term it was moved for. The Court doubted, and ordered Precedents to be looked into: But the Defendant agreeing afterwards to wave his Privilege, a Rule was made for a Trial at Bar in the next Term. Rep. of Pr. in C. B. 66. Edwards v. the Earl of Warwick.

34. It is a general Rule not to grant a Trial at Bar in an issuable Term, lest the other Business of the Court should on Account of such Trial be postponed. 2 Lill. Abr. 742.

35. But, upon the particular Circumstances of a Case, the Court will grant a Trial at Bar in an issuable Term. 1 Barnar. 370. 2 Lill. Abr. 742.

36. By an antient Rule of all the Courts, every Cause to be tried at Bar is to be tried at least fourteen Days before the End of a Term, that the Courts may be at Liberty towards the End of the Term to proceed upon Matters of Law, which are the more proper Business of the Courts. 2 Lill. Abr. 742.

(F) Of a Trial at Niſi prius.

1. THE Writ of *Niſi Prius* is ſo called from the Words, *Niſi Prius Talis et talis venerint*, which are therein contained.

2. This Writ is given by the Statute of Second *Weſtminſter*, *c.* 30. for the Sake of delivering Parties from the great Trouble and Expence of trying their Cauſes at Bar.

Bro. Niſi Prius, pl. 2. pl. 9. 3. The Writ of *Niſi prius* ought not to be iſſued before the *Venire Facias* is returned; for until this is returned the Name of the Jurors are not of Record.

Bro. Niſi Prius, pl. 9. 4. But a Writ of *Niſi Prius* iſſued upon the Day of the Return of the *Venire Facias* was holden to be well enough; although it did not appear, that the *Venire Facias* was in Fact returned before the Writ of *Niſi Prius* was iſſued.

5. It is in the general true, that the Defendant in an Action is not intitled to a Writ of *Niſi Prius*, unleſs the Plaintiff have made Default in proceeding to Trial.

Bro. Niſi Prius, pl. 40. 2 Hawk. Pl. C. 408. 6. But in an Action of Replevin or *Quare impedit*, in both which Actions the Defendant is an Actor, he may ſue out a Writ of *Niſi prius*, although the Plaintiff have not made Default in proceeding to Trial.

2 Lev. 5. Dennis *v.* Dennis. 7. It has been holden, that the Defendant in a Writ of Error may ſue out a Writ of *Niſi Prius*, in caſe Iſſue be joined upon an Error in Fact, although the Plaintiff have not made Default in proceeding to Trial: For that, if this could not be done, the Effect of the Judgment in the original Action might be delayed by the Plaintiff in Error.

8. If both Parties deſire it, a Cauſe which is proper to be tried at Bar may be tried at *Niſi Prius*; for in that Part of the Statute, deſcribing Cauſes which may be tried at Bar, it is declared, that if both Parties deſire it any one of theſe may be tried at *Niſi Prius*.

Bro. Niſi Prius, pl. 19. 2 Hawk. Pl. C. 411. 9. An Action of Appeal may be tried at *Niſi Prius*.

Gilb. Hiſt. C. P. 91. 10. If the Plaintiff in a Country Cauſe have neglected to try it at the next Aſſizes after Iſſue was joined, the Defendant may ſue out a Writ of *Niſi Prius* with Proviſo.

Ibid. 11. It is ſaid, that the Defendant in a Town Cauſe cannot ſue out a Writ of *Niſi Prius* with Proviſo; unleſs the Plaintiff have neglected to proceed to Trial for the Space of one whole Term after Iſſue was joined.

Rep. of Pr. in C.B. 101. Williams *v.* Jones. 12. But it has been holden, that the Defendant in a Town Cauſe may ſue out a Writ of *Niſi Prius* with Proviſo, as ſoon as the Plaintiff has been guilty of one Default in proceeding to Trial after Iſſue was joined.

2 Hawk. Pl. C. 408. 13. The Defendant may ſue out a Writ of *Niſi Prius* with Proviſo in an Action of Appeal; whether it be brought for a capital Offence or for one that is not ſo.

1 Sid. 316. Anon. 14. And it is ſaid in one Caſe, that the Defendant in an Indictment may ſue out a Writ of *Niſi Prius* with Proviſo.

1 Ventr. 315. Anon. 2 Hawk. Pl. C. 408. 15. But it ſeems to be the better Opinion, that the Defendant cannot, in any Cauſe either civil or criminal in which the King is a Party, ſue out a Writ of *Niſi Prius* with Proviſo: Becauſe a Default cannot be imputed to the King.

16. And it has been doubted, whether the Defendant in an Information *qui tam* can ſue out a Writ of *Niſi Prius* with Proviſo: Becauſe the King is *quaſi* a Party. 2 Leon. 110. Knevit v. Taylor.

17. If two Writs of *Niſi Prius*, with Proviſo, one of which was ſued out by the Plaintiff, the other by the Defendant, come to the Hands of the Sheriff, it is in his Option to return which he pleaſes. Bro. Proces pl. 56. 2 Roll. Abr. 666.

(G) Of Notice of Trial.

1. IT is in one Caſe ſaid, that Notice of Trial, which muſt be in writing, cannot be given in the Country. 1 Barn. 216. Hankey v. Hoblin. Trin. 8 G. 2.

2. But in a ſubſequent Caſe the following Diſtinction is taken, that if Notice of Trial be given with the Iſſue, it muſt be given in Town, becauſe the Iſſue can only be delivered in Town: But that if Notice of Trial be not given with the Iſſue, it may be given in the Country. 2 Barn. 239. Taſhburn v. Havelock. Mich. 16 G. 2.

3. Eight Days Notice of Trial are ſufficient, if the Cauſe is to be tried in *London* or *Weſtminſter*, and the Defendant do not reſide above forty Miles from theſe Cities reſpectively.

4. By the 14 *G.* 2. *c.* 17. *par.* 4. it is enacted, "That no Indictment, "Information or Cauſe whatſoever, ſhall be tried before any Judge of "Aſſize or *Niſi Prius*, or at any Sitting in *London* or *Weſtminſter*, where "the Defendant reſides above forty Miles from the ſaid Cities reſpectively, "unleſs Notice of Trial in Writing has been given at leaſt ten Days be-"fore ſuch intended Trial."

5. Before the making of this Statute, the Practice of the Courts was to give fourteen Days Notice of Trial, if the Cauſe were to be tried in *London* or *Weſtminſter*, and the Defendant reſided above forty Miles from theſe Cities reſpectively; and it has been holden, that as the Words of this Statute are not in the negative, namely, that no more then ten Days Notice ſhall be given, the Practice of the Courts, which is the Law of the Courts, is not taken away; and conſequently, that fourteen Days Notice are in ſuch Caſe ſtill neceſſary. 2 Barn. 238. Bowler v. Jenkin. Hil. 15 G. 2.

6. Notice cannot be given of a Trial at Bar; until the Day appointed for the Trial be entered in the Book of the Clerk of the Papers. 2 Lill. Abr. 741.

7. By the antient Rules of the Courts of King's Bench and Common Pleas a whole Term's Notice is neceſſary to be given, before there can be any Proceeding in a Cauſe, wherein there has been no Proceeding for the Space of four Terms.

8. Some Doubts having ariſen concerning the Conſtruction of theſe Rules, it is by a Rule of the Court of Common Pleas of *Eaſter* 13 *Geo* 2. ordered, "That in every Cauſe, wherein there has been no Proceeding for "four Terms, excluſive of the Term in which the laſt Proceeding was, "the Party who deſires to proceed again ſhall give a Term's Notice to "the other Party of ſuch Proceeding; that ſuch Notice ſhall be given be-"fore the Eſſoign Day of the fifth or other ſubſequent Term; that a "Judge's Summons, if no Order has been made thereupon, ſhall not be "deemed a Proceeding; but that Notice of Trial, although it was after-"wards countermanded, ſhall be deemed a Proceeding within the Mean-"ing of this Rule."

9. It

1 Sid. 92. Powys's Caſe.

9. It has been holden, that although a Cauſe have been at Iſſue more than four Terms, if the Trial have been delayed by Reaſon of Privilege of Parliament, it is not neceſſary to give a whole Term's Notice of Trial.

Ibid.

10. It has been alſo holden, that if the Trial of a Cauſe, which has been at Iſſue above four Terms, have been delayed Part of the Time by an Injunction from a Court of Equity, it is not neceſſary to give a whole Term's Notice of Trial.

1 Barn. 220. Smith *v.* Hoff.

11. If Notice of Trial have been countermanded, it cannot afterwards be continued: But new Notice muſt be given.

1 Barn. 214. Jacob *v.* Marſh.

12. If the Name of the Cauſe be not inſerted in the Notice of Trial the Notice is not good; and this Defect is not cured by inſerting the Name in the Continuance of the Notice.

1 Barn. 206. Boyes *v.* Twiſt.

13. Notice of Trial can be continued only once; for the Court will not ſuffer this, which amounts to giving ſhort Notice of Trial, to be done a ſecond Time.

Ibid.

14. But if the full Time required for new Notice of Trial be given in a ſecond Notice of Continuance, this is good as a new Notice of Trial; for the Court will reject the Words of Continuance as Surpluſage.

2 Lill. Abr. 744.

15. If a Cauſe be made a Remanet *pro Defectu Juratorum*, new Notice of Trial muſt be given.

2 Lill. Abr. 745.

16. It is ſaid, that if a Cauſe were made a Remanet by the Judge, becauſe there was not Time to try it, there is no Neceſſity to give a new Notice of Trial; for that the Defendant is in ſuch Caſe bound at his Peril to attend until the Cauſe is tried.

Rep. of Pr. in C. P. 125. Swall *v.* Leaver.

17. If the Defendant proceed to Trial of a Cauſe under a Writ of *Niſi Prius* with Proviſo, he is liable to the ſame Rules, as to the giving Notice of Trial, as the Plaintiff would have been.

Sayer 90. Rex *v.* Furſer.

18. It has been holden, that although the Defendant, who has removed an Indictment, be obliged by the Recognizance entered into upon removing it to try the Iſſue which ſhall be joined at the next Aſſize, he muſt give Notice of Trial; and that entering Notice in the Office-Book is not ſufficient Notice.

1 Barn. 216. Hankey *v.* Hoblin. 2 Barn. 239.

19. Notice of countermanding a Trial, which muſt be in writing, may be given in the Country.

Rule of K. B. Mich. 4. Ann.

20. It was heretofore ſufficient to give two Days Notice of countermanding the Trial of a Cauſe, which was to be tried at a Sitting in *London* or *Weſtminſter*.

2 Barn. 237. Stafford *v.* Thompſon.

21. It was alſo heretofore ſufficient to give two Days Notice of countermanding the Trial of a Cauſe, which was to be tried at an Aſſize, unleſs the Notice were delivered to the Agent in Town; in which Caſe four Days Notice were neceſſary.

22. By the 14 *G.* 2. *c.* 17. *par.* 5. it is enacted, "That where any Party "ſhall have given Notice of the Trial of any Cauſe, before any Judge of "Aſſize or *Niſi Prius*, or at any Sitting in *London* or *Weſtminſter*, where "the Defendant lives above forty Miles from the ſaid Cities reſpectively, "and ſhall not afterwards countermand the ſame in Writing ſix Days at "the leaſt before ſuch intended Trial, every ſuch Party ſhall be obliged "to pay the like Coſts and Charges, as if ſuch Notice of Trial had not "been countermanded."

(H) Of putting off a Trial.

1. THE Trial of an Indictment was proceeded to, notwithſtanding an Order under the Sign Manual to the Clerk of the Crown to enter a *ceſſer* of Proſecution. And by the Court—We are not to delay a Cauſe by Reaſon of the Great or Little Seal. 1 Ventr. 33. Rex *v.* Benſon.

2. A Motion being made, at the Inſtance of the Defendant, to put off the Trial of an Indictment for a Miſdemeanor on Account of the Abſence of a material Witneſs, it was inſiſted, that the Trial ought not to be put off, becauſe the Proſecution was carried on at the Expence of the Crown: But the Court did without Heſitation make a Rule for putting it off. M. S. Rep. Rex *v.* Stuart. Trin 33 G. 2.

3. In an Action by an Adminiſtrator a Motion was made to put off the Trial, until a Suit in a Spiritual Court concerning the Right of the Plaintiff to be Adminiſtrator ſhould be determined. The Motion was refuſed. And by the Court—A Court of Common Law cannot take Notice of a Proceeding in an Eccleſiaſtical Court. Salk. 646. Saliſbury *v.* Proctor. Salk. 649.

4. A Motion was made to put off a Trial; becauſe the Coſts for not proceeding to Trial of the ſame Cauſe had not been paid. At firſt the Court ſaid, that the Application ought to have been for an Attachment for Non-payment of the Coſts: But it appearing that an Attachment would Anſwer no Purpoſe, the Plaintiff being already in Cuſtody, a Rule was made for putting off the Trial. 1 Barnard, 44. Smith *v.* Lidcote.

5. It is not uſual, to make a Rule for putting off the Trial of a Cauſe longer than to the next Term, or the next Aſſize, after the Rule for putting it off is made.

6. But upon the particular Circumſtances of a Caſe, the Court will make a Rule for putting off the Trial of a Cauſe to the ſecond Term after the Rule for putting it off is made. Rep of Pr. in C.P. 45. 119. 1 Barn. 324.

7. It is a general Rule, that a Motion for putting off a Trial muſt be made two Days at the leaſt, before the Day on which the Cauſe ſtands for Trial. Rep. of Pr. in C. P. 99. 1 Barn. 320, 326, 329, 330.

8. But upon the particular Circumſtances of a Caſe the Court will diſpenſe with this Rule. After a Cauſe had been called on and made a Remanet by Conſent, a Motion was made for putting off the Trial on Account of the Abſence of a material Witneſs. A Rule for putting it off was made; becauſe it appeared, that it did not come to the Knowledge of the Defendant, that this Witneſs was a material one, Time enough to make the Motion for putting off the Trial two Days, before the Day on which the Cauſe was to have been tried. 2 Barn. 359. Hart *v.* Whitlocke.

9. A Motion was made to put off the Trial of a Cauſe upon the Affidavit of a third Perſon, that *J. S.* an abſent Perſon was a material Witneſs for the Defendant. No Rule was made. And by the Court—The Affidavit, that an abſent Witneſs is a material one, muſt, in order to obtain a Rule for putting off a Trial, be made by the Defendant himſelf. 1 Barn. 318. Carter *v.* Uppington, Mich. 7 G. 2.

10. The Defendant's Attorney, in order to obtain a Rule for putting off a Trial made Affidavit that *J. S.* was a material Witneſs for the Defendant; and that he was beyond *York*, and could not be in *London* Time enough to give Evidence at the Trial. No Rule was granted. And by the Court—It is ſettled, that a Trial ought not to be put off on Account of the Abſence of a Witneſs, unleſs the Defendant himſelf do make an Affidavit, that the Witneſs is a material one. Rep. of Pract. in C. P. 96. Price *v.* Warren, Hil. 7 G. 2.

11. But

2 Barn. 353. Day v. Samſon, Trin. 14 G. 2.

11. But it appears from a ſubſequent Caſe, that it is not always neceſſary, in order to obtain a Rule for putting off a Trial on Account of the Abſence of a Witneſs, that the Defendant himſelf ſhould make Affidavit that the Witneſs is a material one. Upon ſhewing Cauſe, againſt a Rule for putting off a Trial on Account of the Abſence of a Witneſs, it was objected, that the Affidavit of the Witneſs being a material one was not made by the Defendant himſelf. The Rule was made abſolute. And by the Court—There may be a Caſe, wherein a third Perſon can ſwear that a Witneſs is a material one and the Defendant himſelf cannot, as if a Factor ſell Goods for his Principal and employ a Porter to deliver them, the Factor in this Caſe knows the Porter to be a material Witneſs, but the Defendant does not.

Rep. of Pr. in C. P. 81. Welberry v. Liſter. 2 Barn. 353.

12. In order to put off a Trial on Account of the Abſence of a Witneſs the Affidavit muſt be poſitive that the Witneſs is a material one; for the Court will never delay a Plaintiff without apparent Cauſe, and nothing is ſo eaſy as for a Defendant to ſwear, that he believes a Witneſs to be a material one.

1 Barn. 327. Bourne v. Church.

13. If it appear, that the Witneſs, whoſe Abſence is made the Ground of a Motion for putting off a Trial, was not abſent at the Time Notice of Trial was given, the Court will not make a Rule for putting off the Trial.

14. It is in the general required, that the Affidavit, for obtaining a Rule to put off a Trial on Account of the Abſence of a Witneſs, ſhould ſhew at what Time the Witneſs is expected to return.

1 Barnard, 39. Anon.

15. But it is ſaid, that it is not always neceſſary to ſhew this; for that in ſome Caſes, as if the Witneſs be gone in a Ship belonging to a Fleet in the King's Service, it is impoſſible to form a Judgment at what Time he will return, unleſs the Perſon who makes the Affidavit know what Inſtructions were given to the Commander of the Fleet.

1 Barn. 319. Roberts v. Downes.

16. A Motion was made to put off a Trial, becauſe the Witneſs who could prove a ſet-off was abſent; but the Court was of Opinion, that, as this is a collateral Defence, and there is no Inſtance in which a Trial has in ſuch Caſe been put off, the Trial ought not to be put off.

(O) At what Time an Indictment may be tried before Juſtices of Oyer and Terminer.

Kellw. 159.

1. IT has been holden by all the Judges of *England*, that Juſtices of *Oyer* and *Terminer* cannot proceed to the Trial of an Indictment upon the Day that Iſſue is joined: But that Juſtices of Gaol Delivery may.

4 Inſt. 164. 2 Inſt. 568. 2 Hawk. Pl. C. 406.

2. The Reaſon given for the Difference is, that as Juſtices of Gaol Delivery do, ſome Time before their coming, iſſue a general Precept to the Sheriff, for returning before them at the Day of their Seſſion twenty-four out of every Hundred, to do thoſe Things which ſhall be enjoined them on the Part of the King, it is preſumed, that there are always enough of thoſe returned under the general Precept in Court, out of whom the Sheriff, an Award being for that Purpoſe made by the Court, may return a Jury immediately under the general Precept.

3. This

3. This Reaſon does not appear to be concluſive; for a general Precept is iſſued, at the ſame Diſtance of Time before their holding of a Seſſion, and in the very ſame Terms, by Juſtices of *Oyer* and *Terminer*. 2 Hawk. Pl. C. 406.

4. But whether the Difference depends upon Uſage, or upon whatſoever it does depend, the Law ſeems to be ſettled, that Juſtices of *Oyer* and *Terminer* cannot award a Jury for the Trial of an Indictment, to be returned immediately out of thoſe returned under the general Precept; but that they muſt iſſue a *Venire Facias* for the returning of a Jury. 4 Inſt. 464. 2 Inſt. 568. 9 Rep. 118. 2 Hawk. Pl. C. 406.

5. It was in one Caſe inſiſted, that Juſtices of Gaol Delivery have not a Power to award a Jury, to be returned immediately for the Trial of an Indictment, unleſs the Party indicted be in Priſon: But the Opinion of the Court was, that ſuch Juſtices can as well do this where the Party is not in Priſon as where he is. Cro. Car. 340. Rex *v.* Chapman.

6. It is ſaid by *Coke* Ch. J. that, although Juſtices of *Oyer* and *Terminer* cannot award a Jury, to be returned immediately for the Trial of an Indictment out of thoſe returned under the general Precept, they have a Power in all Caſes to award a *Venire Facias* returnable immediately, and he cites divers old Caſes, in which ſuch Power was in Fact exerciſed. 4 Inſt. 164. 2 Inſt. 568.

7. But it ſeems to be the better Opinion, that Juſtices of *Oyer* and *Terminer* cannot award a *Venire Facias* returnable in leſs than fifteen Days.

8. In one Caſe a *Venire Facias* returnable immediately, which was awarded by Juſtices of *Oyer* and *Terminer* for the Trial of an Indictment for Barratry, was holden to be good; becauſe it had been awarded with the Conſent of the Party indicted; which ſhews, that without ſuch Conſent it would not have been good. 1 Sid. 99. Rex *v.* Sadler.

9. And it may be inferred from divers other Caſes, that Juſtices of *Oyer* and *Terminer* cannot award a *Venire Facias* returnable in leſs than fifteen Days for the Trial of an Indictment. 2 Roll. Abr. 626. Cro. Car. 315, 448.

10. If an Indictment be found in a County wherein the Court of King's Bench ſits, a *Venire Facias*, returnable immediately, may be awarded for the Trial of the Indictment. 9 Rep. 118. Ld. Sanchar's Caſe.

11. But if an Indictment for a Miſdemeanor, found in a County wherein the Court of King's Bench does not ſit, be removed into that Court, a *Venire Facias* returnable in leſs than fifteen Days cannot be awarded for the Trial of the Indictment. Ibid.

(K) Of the Manner of trying where more than one Iſſue is to be tried.

1. IF in an Action againſt two one of the Defendants plead a Plea in Abatement, and the other Plea which goes to the Action, and Iſſues are joined upon both Pleas, the Iſſue upon the Plea in Abatement ought firſt to be tried: Becauſe if this be found againſt the Plaintiff the whole Action abates. 1 Inſt. 125. 2 Roll. Abr. 628. pl. 7.

2. If in a Perſonal Action againſt two one of the Defendants plead a Plea which goes to the Action, and the other a Plea which extends only to himſelf, and Iſſues are joined upon both Pleas, the Iſſue upon the former Plea ought to be firſt tried: Becauſe if this be found againſt the Plaintiff, the 1 Inſt. 125. Bro. Trial, pl. 1. pl. 48. 2 Roll. Abr. 627. pl. 1.

the other Defendant may take Advantage of the Verdict, in which Caſe there will be an End of the Action.

1 Inſt. 125. 2 Roll. Abr 628. pl. 5. 3. If in an Action of Treſpaſs againſt two one of the Defendants plead a Releaſe, and the other a Plea which extends only to himſelf, as Not guilty or a Juſtification, and Iſſues are joined upon both Pleas, the Iſſue upon the former Plea ſhall be firſt tried: Becauſe if this be found againſt the Plaintiff it makes an End of the Action; the Diſcharge of one Defendant being in ſuch Caſe a Diſcharge of both.

Bro. Trial, pl. 48. 4. If a perſonal Action be brought againſt two, and one of the Defendants plead a Plea which extends to himſelf only upon one Day, and the other a Plea which extends to himſelf only upon a ſubſequent Day, and Iſſues are joined upon both Pleas, the Iſſue upon the former Plea ought to be firſt tried: Becauſe it ſhall be intended to have been firſt pleaded.

2 Inſt. 125. 1 Roll. Abr. 628. pl. 9. 5. If a real Action be brought by *J. S.* as Heir to his Father againſt two, and one of the Tenants plead a Plea which extends only to himſelf, and the other a Plea which goes to the Action, as that the Demandant is a Baſtard, and Iſſues are joined upon both Pleas, it is not material which of the Iſſues is firſt tried; for, although that which goes to the Action be firſt tried and found againſt the Demandant, the other ſhall nevertheleſs be tried: Becauſe the Demandant may recover that Part of the Land, of which the other Tenant is in the Poſſeſſion.

1 Inſt. 125. 6. If in an Action an Iſſue be joined as to Part, and there be a Demurrer as to the Reſidue, it is in the Diſcretion of the Court, to order the Iſſue to be firſt tried, or the Demurrer to be firſt argued.

Sayer 131. Kemp. *v.* Mackerill. 7. At a Trial at Bar, in which eleven Iſſues directed by the Court of Chancery were to be tried, it was moved, that the Evidence as to the different Iſſues might be gone through ſeparately, and the Caſe of Lord *Thanet v.* Sir *Edward Snatchbull* was cited; in which divers Iſſues directed by the Court of Chancery had been tried in divers Terms. This was conſented to by the other Side. And by the Court—The doing of this is quite reaſonable: For if the Evidence be not gone through ſeparately, it muſt in ſumming up be ſeparated by the Judge, otherwiſe the Jury will not be able to find a proper Verdict.

(I.) Of granting a new Trial.

1. In the General.

Sty. 462. Wood *v.* Gunſton. 1. THE Caſe of *Wood* v. *Gunſton*, which was in the Year 1655, is the firſt Caſe reported in the Books, wherein a new Trial was granted:

1 Will. 207. Rex *v.* the Corp of Bowdley. 2. But it is ſaid, that it ought not from thence to be concluded, that this was the firſt Inſtance of granting a new Trial; for that the Silence of Reporters as to this Matter may be imputed, to its not having been formerly the Practice to report what was done by Courts upon Motions.

Salk. 648. Argent *v.* Darrel. 3. It is ſaid by *Holt* Ch. J. that the granting of new Trials muſt have been much more antient than the Caſe of *Wood* v. *Gunſton*: Becauſe it was long before this Caſe a good Cauſe of Challenge to a Juror, that he had before been a Juror in the ſame Cauſe.

Str. 995. Rex *v.* Bell. 4. But it is ſaid in another Caſe, that what is ſaid by *Holt* Ch. J. in the Caſe of *Argent* v. *Darrel* is not of much Weight; for that the Challenge, becauſe

becauſe a Man had before been a Juror in the ſame Cauſe, might have been where a *Venire Facias de novo* had been awarded.

5. The proper Time of moving for a new Trial, if the Cauſe were tried in Term, is within the firſt four Days after the Day upon which it was tried; if it were tried in a Vacation, within the firſt four Days of the next Term: Becauſe Judgment may be entered up after ſuch four Days are reſpectively paſt.

6. But it has been holden, that if Judgment have not been in Fact entered up, a Motion may be made for a new Trial after the Day upon which it might have been entered up is paſt. Str. 995. Gilman *v.* Smith, Mich. 9 G. 1.

7. In a later Caſe however it was holden, that a new Trial cannot be moved for after the Day on which Judgment might have been entered up is paſt, although it have not been in Fact entered up; unleſs the Matter, upon which the Motion is founded, were not diſcovered until ſuch Day was paſt. 1 Barn. 328. Wilis *v.* Bennet, Mich. 11 G. 2.

8. It is in the general true, that a Motion for a new Trial cannot be made after moving in Arreſt of Judgment. Salk. 647. Turbeville *v.* Stamp.

9. But if the Matter, upon which the Motion for a new Trial is founded, were not diſcovered at the Time of moving in Arreſt of Judgment, a Motion for a new Trial may be made after moving in Arreſt of Judgment. Rep. of Pr. in C.B. 124. Philips *v.* Fowler.

10. And if this be not the Caſe, the Court will ſometimes give Leave to move for a new Trial after moving in Arreſt of Judgment; becauſe, if there be Reaſon to arreſt the Judgment, it would be nugatory for the Parties to be at the Expence of a ſecond Trial.

11. A new Trial may be moved for although the Verdict be ſpecial; for the Intention of a ſpecial Verdict can only be to reſerve a Queſtion of Law for the Opinion of the Court, in Caſe the Verdict ſhall ſtand. Bunb. 51. Namink *v.* Farwell.

12. If due Notice of Trial were not given, this is a good Reaſon for granting a new Trial: But if a Defence were made, the Court will not grant a new Trial, although due Notice of Trial was not given; the Defect of Notice being cured by the Defence. Salk. 646. Thermolin *v.* Cole.

13. A new Trial in an Indictment was granted; becauſe the Defendant had not given due Notice of Trial. Sayer 90. Rex *v.* Furſer.

14. A new Trial cannot be moved for after a Nonſuit; the Plaintiff being out of Court. 7 Mod. 54. Hyon *v.* Ballard.

15. But a Motion may be to ſet aſide a Nonſuit for Irregularity, and if it appear to have been obtained irregularly, the Court will make a Rule for proceeding in the Cauſe, which anſwers the ſame Purpoſe as granting a new Trial. Rep. of Pr. in C. B. 63, 125. 7 Mod. 54.

16. It has been holden, that a new Trial cannot be moved for in the Court of Common Pleas, in a Cauſe which was tried before a Judge of another Court, unleſs the Fact upon which the Motion is grounded be verified by Affidavit. 2 Barn. 352. Bond *v.* Palmer.

17. But in a late Caſe the Court of Common Pleas made a Rule to ſhew Cauſe, why a new Trial ſhould not be granted in a Cauſe which was tried before a Judge of another Court, although the Fact upon which the Motion was grounded was no verified by an Affidavit. MS. Rep. Gulliver *v.* Moffit, Eaſt. 8 G. 3.

18. It is in the general true, that the Court will not grant a new Trial, unleſs a Report be made of the Trial by the Judge before whom the Cauſe was tried. 3 Keb. 351. St. Bar *v.* Williams.

19. But if the Judge before whom the Cauſe was tried die before he make a Report of the Trial, the Court will receive an Account thereof by Affidavit. MS. Rep. Bolſton *v.* Homes, Trin. 30 G. 2. in B. R.

20. The

20. The Report of the Judge before whom the Cauſe was tried is concluſive, upon a Motion for a new Trial, as to every Thing which paſſed at the Trial.

12 Mod. 336. Anon. 21. It is ſaid by *Holt* Ch. J. that if in his Judgment the Matter deſerves a Re-examination, he ſhould be for granting a new Trial, although it would be contrary to the Report of the Judge.

11 Mod. 1. Anon. 22. If there have been a View the Court will not, unleſs there be ſome ſpecial Reaſon for ſo doing, grant a new Trial: Becauſe it is to be preſumed, that the Jury were as much or perhaps more influenced by what they obſerved upon the View, than by the Evidence given in Court.

12 Mod. 275. Bond *v.* Spark and another. Str. 814. 23. If two Perſons are Defendants in an Action, and there be a Verdict in Favour of one of them, the Court will not grant a new Trial at the Inſtance of the other; becauſe the Verdict muſt, if ſet aſide, be ſet aſide as to both; and it would be very unreaſonable, that he in whoſe Favour the Verdict is ſhould be a ſecond Time in Jeopardy. But if the Defendant, in whoſe Favour the Verdict is, conſent to the granting of a new Trial, the Court will, provided it be in other Reſpects proper, grant a new Trial.

12 Mod. 319. Richardſon *v.* Williams. 24. The Court will not grant a new Trial, if it be probable, that the Verdict, in Caſe a different one be found upon the new Trial, will be given in Evidence in a criminal Proſecution.

2 Vern. 75. 12 Mod. 370. 25. It is in the general true, that the Court will not grant a new Trial upon the Merits, without the Condition of paying the Coſts of the former Trial.

26. But the Court will ſometimes grant a new Trial upon the Merits, without the Condition of paying the Coſts of the former Trial.

Str. 642. Hale *v.* Cove. 27. It being diſcovered, that the Jury had drawn Lots, in order to determine for which Party they ſhould find a Verdict; the Court granted a new Trial, and ordered that the Coſts of the former Trial ſhould abide the Event thereof.

MS. Rep. Pickerſgill *v.* Palmer, Hil. 2 G. 3. in C. B. 28. At the Trial of an Action of falſe Impriſonment againſt a Juſtice of the Peace it appeared, that the Action was commenced within ſix Months after the End of the Impriſonment of the Plaintiff, but not within ſix Months after the Day of his Commitment. It was ruled by *Willes* Ch. J. before whom the Cauſe was tried, that the Action was not commenced within the Time limited by the 24 *G.* 2. *c.* 44. and the Plaintiff was nonſuited. A new Trial was granted, without the Condition of paying the Coſts of the former Trial.

MS. Rep. Edie and Lard *v.* the Eaſt India Comp. Trin. 1 G. 3. in K. B. 29. Two Bills of Exchange, drawn by Colonel *Clive* upon the *Eaſt India* Company, payable to *Campbell* or Order, had been indorſed by *Campbell* to *Ogilby*; but the Words *or Order* were not added in the Indorſement of one of the Bills. Both the Bills being afterwards indorſed by *Ogilby* to *Edie* and *Lard* and Order, an Action of *Aſſumpſit* was brought upon them. There being no Doubt as to the Bill which was indorſed to *Ogilby* or Order; the Jury found for the Plaintiffs as to the Count wherein this was declared for. As to another Count wherein the Bill indorſed to *Ogilby* only was declared for, they found for the Defendants; but their Verdict as to this Count was grounded entirely upon Evidence, that by the Uſage of Merchants this Bill was not aſſignable to the Plaintiffs, becauſe the Words *or Order* were not added in the Indorſement from *Campbell* to *Ogilby*. Upon a Motion for a new Trial Lord *Mansfield* Ch. J. before whom the Cauſe was tried, reported, that he told the Jury, that by the general Law every Indorſement of a Bill of Exchange would follow the Nature of the original Bill; and conſequently, that if the original Bill were payable to *J. S.* and Order, an Indorſement by *J. S.* to *J. N.* would be a good Aſſignment to *J. N.* and his Order, notwithſtanding the Words *or Order* were not added in the Indorſement to *J. N.* But that, if they were fully ſatisfied from the Evidence which had been given, that the Words *or Order* are by the Uſage

Uſage of Merchants neceſſary to the enabling of an Indorſee to aſſign a Bill of Exchange, they ought to find for the Defendants as to that Bill in the Indorſement of which theſe Words were not added. His Lordſhip added, that at the Trial of the Cauſe he was of Opinion, that Evidence of the Uſage of Merchants was in this Caſe admiſſible; but that, having ſince looked into the Caſes upon the Point, and conſidered the Matter with great Attention, he is now clearly of Opinion, that he ought not to have admitted ſuch Evidence, and conſequently that, as the Verdict upon that Count which is found for the Defendants was entirely grounded upon Evidence of the Uſage of Merchants, a new Trial ought to be granted.

30. The other Juſtices being of the ſame Opinion, the remaining Conſideration was, whether the new Trial ſhould be granted upon the uſual Condition of paying the Coſts of the former Trial. It was holden, that no Coſts ſhould be paid. And by the Court—As a Verdict muſt, if ſet aſide, be ſet aſide generally, and this Verdict is agreed to be right as to the Count which is found for the Plaintiff, there is no Reaſon that he ſhould pay the Coſts of the former Trial.

31. It is ſaid, that when a new Trial is granted the firſt Verdict ought to ſtand as a Security, for that otherwiſe the Party againſt whom it was obtained may ſpirit away the Witneſſes upon whoſe Teſtimony it was founded, and thereby deprive the other Party both of the Benefit of the firſt Verdict, and of the Means of obtaining a ſecond. 12 Mod. 439. Anon. Sty. 466.

32. It is in the general true, that if a new Trial have been granted, and there be a Verdict for the ſame Party that the Verdict upon the firſt Trial was, the Court will not grant a third Trial. Salk. 649. Clark v. Udall. Str. 692.

33. But upon the particular Circumſtances of a Caſe, as if the ſecond Verdict have been obtained by unfair Practice, the Court will grant a third Trial. 6 Mod. 22.

34. It is ſaid, that Courts of Equity do not grant a new Trial as a Thing of Courſe, although an Eſtate of Inheritance will be bound by the Verdict; for that the granting or not granting of a new Trial does always depend upon the Circumſtances of the Caſe. Vin. Trial, 467. pl. 4.

35. A new Trial cannot be granted by an inferior Court, and if the Judge thereof do grant one, a *Mandamus* lies for a *Procedendo ad Judicium* upon the Verdict. Salk. 650. Str. 113. Sayer 203.

2. After a Trial at Bar.

36. It is laid down in divers Caſes, that the Court ought not to grant a new Trial after a Trial at Bar, unleſs there have been a Miſbehaviour in the Jury; for that a Trial at Bar, by Reaſon of its greater Solemnity, is of much more Authority than a Trial at *Niſi Prius*. 1 Sid. 58. Salk. 648. 7 Mod. 37. 12 Mod. 93, 128. 1 Will. 213. Prec. in Ch. 193. Ld. Raym. 514.

37. But it has been holden in other Caſes, that the Court ought, if the Circumſtances of the Caſe require it, to grant a new Trial after a Trial at Bar. Str. 584, 1105. Ld. Raym. 1360.

38. And it is in one of theſe Caſes obſerved, that in the Caſe of *Wood* v. *Gunſton*, which is the firſt Caſe reported in the Books wherein a new Trial was granted, it was granted after a Trial at Bar. Str. 585. Mulgrave v. Nevinſon.

Salk. 650. Fenwick v. Lady Groſvenor.

39. As the Verdict upon an Iſſue directed from the Court of Chancery is only to inform the Conſcience of the Chancellor, this Court does frequently grant a new Trial after a Trial at Bar.

3. On Account of a Defect, or Miſtake of the Judge before whom the Cauſe was tried.

2 Lill. Abr. 749.

40. If the Judge before whom a Cauſe was tried were therein intereſted, the Court will grant a new Trial, and it is ſaid the Court will do this, notwithſtanding both Parties conſented to the Cauſe being tried before ſuch Judge; for it is not to be imagined that he could be quite indifferent.

11 Mod. 119. Lady Herbert v. Shaw.

41. A new Trial was granted, becauſe a Peer of the Realm who was intereſted in the Cauſe ſat upon the Bench during the Trial.

10 Mod. 202. Reg. v. the Corp. of Helſton.

42. If the Judge before whom the Cauſe was tried made any Miſtake, the Court will grant a new Trial; for a Judge of *Niſi Prius* is rather to be conſidered as having acted in a miniſterial than a judicial Capacity; and as the Ground of granting a new Trial is doing Juſtice to the Party injured by the Verdict, it ought as well to be granted on Account of a Miſtake in the Judge, as upon Account of a Miſtake in the Jury.

6 Mod. 242. 7 Mod. 53, 64.

43. If the Judge before whom the Cauſe was tried have refuſed to admit proper Evidence, this is a good Reaſon for granting a new Trial.

7 Mod. 64. Thomkins v. Hill. 7 Mod. 53.

44. If the Judge before whom the Cauſe was tried did admit improper Evidence which was objected to, the more regular Way was to have tendered a Bill of Exceptions: But notwithſtanding this have been omitted, the Court will grant a new Trial.

4. On Account of a Defect, Miſtake, or Fault of the Jury by whom the Cauſe was tried.

11 Mod. 1.

45. If the Sheriff did not follow the Direction of a Rule of Court in returning the Jury, this is a good Reaſon for granting a new Trial.

12 Mod. 567. Anon. 12 Mod. 584.

46. But if the Party, againſt whom the Verdict is in ſuch Caſe found, did make a Defence at the Trial, the Court will not grant a new Trial; for, as he would have had the Advantage of the Verdict if it had been in his Favour, he ought to be bound by it.

Cro. Eliz. 57. Diſplin v. Spratt. 1 Roll. Abr. 196. pl. 3.

47. In the *Venire Facias* there was the Name of *Thomas Bucher* of *A.* In the *Diſtringas* this Name was left out, and the Name of *Thomas Carter* of *A.* was inſerted. *Thomas Carter* of *A.* being ſworn upon the Jury which tried the Cauſe, the Verdict was holden to be void; becauſe the Cauſe was not tried by twelve of the Perſons returned upon the Pannel.

Cro. Eliz. 222. Fermor v. Dorrington.

48. In the *Venire Facias* and in the *Diſtringas* there was the Name of *John Taverner*. A Perſon of the Name of *John Turner* being ſworn upon the Jury which tried the Cauſe, the Court upon a Motion in Arreſt of Judgment was clear, that if the Variance had been in the Chriſtian Name Judgment ought to be arreſted: But they had ſome Doubt, whether, as the Variance was in the Surname, this ought now to be done; becauſe a Man may have two Surnames. It was afterwards holden, that Judgment ſhould be arreſted.

2 Barn. 364. Wrey v. Thorn.

49. A Perſon was returned and ſworn upon the Jury by the Name of *Henry*, a new Trial being moved for upon an Affidavit that his Chriſtian Name

Name was *Harry*, it was refuſed. And by the Court—As the Record and the Jury Proceſs are right, an Affidavit ought not to be received to contradict them. This was the Perſon who was returned and intended to be upon the Jury, and it is commonly underſtood, that *Henry* and *Harry* are the ſame Name.

50. A Perſon of the Name of *Richard Sheppard* was returned to ſerve as a Juror on the Crown Side. This Perſon being in the *Niſi Prius* Court, when *Richard Gratter* returned upon the *Niſi Prius* Pannel was called, he anſwered, and was ſworn upon the Jury in the Room of *Gratter*. A new Trial being moved for on the Part of the Defendant, it was ſaid, that the Defendant ought to have challenged this Man, and that the Court will not now receive an Affidavit to contradict the Record: But a new Trial was granted. And by the Court—The Court are not in this Caſe concluded by the Record. The twelve Jurors who try a Cauſe are by the 3 *Geo.* 2. to be drawn out of a Box, and conſequently, as this Man's Name never was in the Box, the Cauſe has not been tried. 2 Barn. 362. Norman *v.* Beaumont.

51. *John Peace* who was returned upon the Pannel did not appear: But when he was called his Son anſwered and was ſworn upon the Jury. A new Trial was granted. And by the Court—This Verdict was not found by twelve of the Perſons returned upon the Pannel. 2 Barn. 366. Ruſſel *v.* Ball.

52. A Perſon returned upon the Pannel by the Name of *Hooper* was challenged, and the Challenge was allowed. This Man being afterwards ſworn upon the Jury as a *Taleſman* by the Name of *Hook*, a new Trial was granted. Ld. Raym. 1410. Parker *v.* Thornton.

53. The Court will not grant a new Trial, becauſe one of the Jurors was related to one of the Parties; for the other Party, who might have challenged this Perſon, ought to ſuffer for his Neglect. 1 Ventr. 30. Cotton *v.* Daintry. Sty. 190.

54. A new Trial being moved for, becauſe one of the Jurors had a Suit depending with the Plaintiff againſt whom the Verdict was found, it was refuſed. And by the Court—Why did not the Plaintiff challenge this Man? Sty. 129. Loveday's Caſe.

55. If there were good Cauſe of Challenge to one of the Jurors, but this was not known, and conſequently could not be taken Advantage of at the Trial, the Court will grant a new Trial. 7 Mod. 54. Hyon *v.* Ballard.

56. A new Trial was granted upon Affidavits of eleven of the Jurors, ſetting forth that they had agreed to find a Verdict for the Plaintiff, and to give him Five Shillings Damages; but that the Foreman had by Miſtake given a Verdict for the Defendant. Rep. of Pr. in C. B. 66. Baker *v.* Miles.

57. A new Trial was granted, becauſe the Jury found a Verdict for the Plaintiff, notwithſtanding they were directed by the Judge before whom the Cauſe was tried, that upon the Evidence they ought to find for the Defendant. Sayer 2. Golding *v.* Crowle.

58. In an Indictment, for putting Ducats into the Pocket of the Proſecutor with an Intent to charge him with Felony, the Jury found the Defendant guilty generally. Upon a Motion for a new Trial Affidavits of all the Jurors were produced, in which they ſwore, that they only intended to find him guilty of the Fact of putting the Ducats into the Proſecutor's Pocket, but not of the Intent; and *Foſter* J. before whom the Indictment was tried, reported, that his Direction to the Jury was, that in Caſe they did not think the Defendant guilty of the Intent they ought to acquit him. A new Trial was granted. And by *Lee* Ch. J.—We do not grant a new Trial on Account of an After-thought of the Jurors, for the doing of this would be a bad Precedent; but becauſe the Verdict was contrary to the Direction of the Judge in a Matter of Law. And by *Deniſon* J.—If the Verdict had been as the Jury intended to find it, namely, that the Defendant was guilty of the Fact but not of the Intent, it would have been an Sayer 35. Rex *v.* Simons.

incompleat Verdict, and conſequently no Judgment could have been given.

Str. 1106, 1142. 59. It is in the general true, that if the Verdict be contrary to Evidence, the Court will grant a new Trial.

60. But in ſome Caſes the Court will not grant a new Trial, although the Verdict be contrary to Evidence.

1 Barn. 9, 317, 333. 61. If there are two Iſſues, and the Verdict be not contrary to Evidence as to one Iſſue, the Court will not grant a new Trial, although it be contrary to Evidence as to the other; for as the Verdict is right in Part, the Court will not ſet it aſide.

Salk. 644. Smith *v.* Frampton. 62. In an Action upon the Caſe againſt *J. S.* for negligently keeping his Fire, by Means whereof the Houſe of the Plaintiff was burnt down, the Verdict was for the Defendant. A new Trial being moved for, it was refuſed, although the Verdict was contrary to Evidence; becauſe it was a hard Action.

Salk. 653. Dunckley *v.* Wade. 63. But if in a hard Action there be a Verdict for the Plaintiff, the Court will, in Caſe the Verdict be contrary to Evidence, grant a new Trial.

Salk. 648. Sparks *v.* Spicer. 64. *J. S.* being hung in Chains by the Sheriff upon the Soil of *J. N.* In an Action brought by *J. N.* a Verdict was found for the Defendant. The Court, although it was contrary to Evidence, refuſed to grant a new Trial; it appearing, that the Sheriff had done this merely for the Conveniency of the Place, and not with a Deſign to affront or annoy *J. N.*

Salk. 646. Deerly *v.* The Ducheſs of Mazarine. 65. In an Action of *Aſſumpſit* the Jury found a Verdict for the Plaintiff, notwithſtanding the Defendant proved her Defence, which was Coverture. A new Trial being moved for, it was refuſed. And by the Court—As the Defendant was reputed to be a Feme Sole, and lived as ſuch, ſhe ought not to have ſet up ſuch a Defence, in order to prevent the Plaintiff from recovering a juſt Debt.

Salk. 644. Smith *v.* Page. 66. The Plaintiff in an Action of Ejectment, who was a Mortgagee, claimed under a Surrender of the Premiſſes as being Copyhold: whereas it appeared, that they were not Copyhold. The Defendant claimed under a voluntary Conveyance. A Verdict being found for the Plaintiff, the Court, although it was contrary to Evidence, refuſed to grant a new Trial; becauſe the granting thereof would, as was ſaid, be contrary to the real Juſtice of the Caſe.

Salk. 647. Starr *v.* Wade. 67. An Action of *Trover* being brought by a Leſſor againſt his Leſſee, for ſome Trees cut down by the latter, a Verdict contrary to Evidence was found for the Defendant: Yet a new Trial was refuſed: Becauſe it appeared, that the Trees were cut down in making Ditches, which were of more Advantage to the Land than the Value of the Trees.

MS. Rep. Macro *v.* Hull. Mich. 30 G. 2. in B. R. 68. A new Trial being moved for in an Action of Treſpaſs, the Judge before whom the Cauſe was tried reported, that the Treſpaſs was proved, and that the Jury ought according to the Evidence to have found a Verdict for the Plaintiff; but that in his Opinion Sixpence Damages would have been ſufficient. A new Trial was refuſed. And by Lord *Mansfield* Ch. J.—As the granting of a new Trial is diſcretionary, the Court will never miniſter to the Paſſions of either Party, by granting one in a Caſe like the preſent, wherein the Juſtice of the Caſe does by no Means require it.

MS. Rep. Burton *v.* Thompſon. Mich. 32 G. 2. in B. R. 69. Upon a Motion for a new Trial in an Action for a Libel accuſing the Plaintiff of Diſaffection, the Judge before whom the Cauſe was tried reported, that the Jury had found a Verdict for the Defendant contrary both to Evidence and his Direction: But that, as the general Character of the Plaintiff was proved to be that of a Jacobite, and no Damage was proved to have been ſuſtained, the Jury ought not in his Opinion to have given more than Two Shillings and Sixpence Damages. The Court refuſed to

grant a new Trial: And by Lord *Mansfield* Ch. J. a new Trial ought never to be grante , unleſs ſome manifeſt Injuſtice be done by the Verdict. As this is a vindictive Action, and it was not proved that the Plaintiff ſuſtained any Damage, the granting of a new Trial, by which the Plaintiff in all Probability would be Money out of Pocket if he ſhould obtain a Verdict, would anſwer no other End than that of vexing the Defendant. It is the Duty of the Court to ſee, that ſubſtantial Juſtice be in every Caſe done to both Parties; but they ought never to miniſter to the Paſſions of either.

70. A new Trial has in ſome Caſes been granted, becauſe the Verdict was, in the Opinion of the Judge before whom the Cauſe was tried, contrary to the Weight of Evidence.

71. In one Caſe the Verdict was for the Plaintiff: But upon the Report of *Willes* Ch. J. before whom the Cauſe was tried, that the Weight of Evidence was in his Opinion with the Defendant, a new Trial was granted. 1 Barn. 322. Wheeler *v.* Pitt, Mich. 8. G. 2.

72. *Ryder* Ch. J. before whom the Cauſe was tried, reported, that there was Evidence on both Sides: But that the Evidence for the Party in whoſe Favour the Verdict was was ſo very ſlight, that the Jury ought not in his Opinion to have regarded it; and that the Evidence for the other Party was very ſtrong; and he added that he was diſſatisfied with the Verdict. A new Trial was granted. Sayer 264. Berks *v.* Maſon. Hil. 29. G. 2.

73. In another Caſe, wherein a new Trial was granted, it was laid down generally, that the Court ought to grant a new Trial, if the Verdict be in the Opinion of the Judge before whom the Cauſe was tried contrary to the Weight of Evidence, although there were Evidence on both Sides. MS. Rep. Bright *v.* Enion, Trin. 30 G. 2. in B. R.

74. A new Trial has in ſome other Caſes been refuſed, notwithſtanding the Verdict was, in the Opinion of the Judge before whom the Cauſe was tried, contrary to the Weight of Evidence.

75. In one Caſe the Judge, before whom the Cauſe was tried, reported, that the Weight of Evidence was with the Plaintiff, and that in his Opinion the Jury ought to have found a Verdict for him. A new Trial was refuſed. And by the Court—As there was Evidence for the Defendant, the Jury were the proper Perſons to judge on which Side the Weight of Evidence was. Str. 1142. Aſhley *v.* Aſhley, Mich. 14 G. 2.

76. In another Caſe a new Trial was refuſed, although *Lee* Ch. J. reported, that the Evidence for the Plaintiff, was very weak, and that he had ſummed up the Evidence ſtrongly for the Defendant. Str. 1142. Smith *v.* Huggins, Mich. 14 G. 2.

77. In another Caſe *Pratt* Ch. J. before whom the Cauſe was tried, after reporting the Evidence ſpecially, expreſſed himſelf to this Effect. If I had been upon the Jury, and had known no more of the Witneſſes than I did when this Cauſe was tried, I ſhould have thought the Verdict ought to have been for the Defendant; but I do not chuſe to declare myſelf diſſatisfied with the Verdict: Becauſe, where there is a Contrariety of Evidence as to the Principal Matter in Iſſue, and the Characters of the Witneſſes on both Sides ſtand unimpeached, the Weight of Evidence does not depend altogether upon the Number of Witneſſes; for it is the Province of the Jury, who may know them all, to determine which Witneſs they will give Credit to; and no Judge has in my Opinion a Right to blame a Jury, for exerciſing their Power of determining in ſuch Caſe. He concluded with leaving the Matter to the other Juſtices. A new Trial was refuſed. And by *Clive* J.—The granting of a new Trial in this Caſe would be taking away that Power, which is by the Conſtitution veſted in the Jury. And by *Bathurſt* J.—As there was in this Caſe ſtrong Evidence for the Plaintiff, a new Trial ought not to be granted; although the Weight of Evidence was in my Lord Chief Juſtice's Opinion with the Defendant. MS. Rep. Francis *v.* Baker. Hil. 3 G. 3. in C. B.

And

And by *Gould* J.—It is difficult to draw a Line as to the granting of a new Trial; and perhaps the granting or not granting of it muſt always depend upon the Circumſtances of the Caſe. In the preſent Caſe there is no Reaſon to grant one.

2 Roll. Rep. 21. Marſham v. Buller. 78. It is in one Caſe ſaid, that if in an Action which ſounds in Damages, as an Action of Treſpaſs, only half a Farthing be aſſeſſed for Damages, the Court will not grant a new Trial, it being in the Power of the Jury to aſſeſs as ſmall Damages as they pleaſe in ſuch Action.

Str. 940. Hayward v. Newton. Mich. 6 G. 2. 79. In an Action for Words the Plaintiff had a Verdict with Twenty Shillings Damages. A new Trial being moved for, it was refuſed. And by the Court—This is a hard Caſe; but the Court has conſtantly refuſed to grant a new Trial on Account of the Smallneſs of the Damages.

Str. 1051. Barker v. Sir Woolſton Dixie, Trin. 9 G. 2. 80. In an Action for a malicious Proſecution of the Plaintiff for Felony the Damages were only Six Shillings: Yet the Court refuſed to grant a new Trial. It is moreover in this Caſe ſaid, that the Court will never grant a new Trial on Account of the Smallneſs of the Damages; becauſe an Attaint would not lie in ſuch a Caſe againſt the Jury, it not being a falſe Verdict: And it is added, that new Trials were introduced in the Room of Attaints, as being eaſier and more expeditious Remedies.

1 Barn. 332. Lord Gower v. Heath. Trin. 13 G. 2. 81. In an Action of *Scandalum Magnatum* the Jury found a Verdict for the Plaintiff with only Twelve-pence Damages. A new Trial being moved for on Account of the Smallneſs of the Damages, it was refuſed. And by the Court—No Inſtance has been produced of granting a new Trial on Account of the Smallneſs of the Damages.

2 Barn. 366. Ruſſel v. Ball. Eaſt. 18 G. 2. 82. A new Trial being moved for on Account of the Smallneſs of the Damages, it was refuſed. And by the Court—Where the Demand is certain, as if it ariſe upon a promiſſory Note, the Court will grant a new Trial on Account of the Smallneſs of the Damages: But where the Demand is uncertain, as in the preſent Caſe where it is for the Cure of a Wound, the Court ought not to grant a new Trial on Account of the Smallneſs of the Damages.

Salk. 647. Anon. Mich. 10 W. 3. 83. In an Action of Covenant, in which the Damages ſuſtained appeared to be One Hundred Pounds, there was Judgment upon a Demurrer for the Plaintiff. A leſſer Sum being found by the Jury upon the Execution of a Writ of Enquiry, a new Writ of Enquiry was awarded. And by the Court—As an Action of Debt might have been brought for the Hundred Pounds, the Jury ought to have found Damages to the Amount of the whole Sum, unleſs the Defendant had proved ſomething to leſſen it. The general Rule, of not granting a new Trial, or a new Writ of Enquiry, upon Account of the Smallneſs of the Damages, does not extend to this Caſe.

Str. 425. Woodford v. Eades. Eaſt. 7 G. 1. 84. Upon a Contract for Stock the Plaintiff and *J. S.* did each depoſit Two Hundred Pounds in the Hands of the Defendant. As *J. S.* did not perform his Part of the Contract, the Plaintiff brought an Action for the Four Hundred Pounds depoſited, and obtained Judgment upon a Demurrer. A Writ of Enquiry was executed, and the Plaintiff proved his Caſe; yet the Jury, upon a miſtaken Motion that the Defendant could not part with the Money without the Conſent of both Parties, found only a Penny Damages. A new Writ of Enquiry was awarded. And by the Court—The Rule, of not ſetting aſide a Verdict on Account of the Smallneſs of the Damages, does not extend to this Caſe, in which the Jury were miſtaken in a Point of Law.

2 Barn. 354. Tutton v. Andrews. Trin. 14 G. 2. 85. Upon the Execution of a Writ of Enquiry the Sheriff admitted improper Evidence upon the Part of the Defendant; by Reaſon of which the Damages found were much leſs than they would otherwiſe have been. A new Writ of Enquiry was awarded. And by the Court—A Notion has prevailed, that where the Damages are exceſſive the Court may grant a

new

new Trial; but that it cannot where they are too ſmall: But there ſeems to be no good Reaſon, why a new Trial ſhould not be as well granted in the latter Caſe as in the former.

86. It is ſaid, that a new Trial was granted, on Account of the Exceſſiveneſs of the Damages in an Action for Words. And by *Glyn* Ch. J.—Wherever the Court believes, that the Verdict was contrary to the Direction of the Judge before whom the Cauſe was tried, a new Trial may be granted. But in a fuller Report of this Caſe, in page 466 of the ſame Book, the new Trial does not appear to have been granted merely on Account of the Exceſſiveneſs of the Damages, but becauſe the Jury had ſhewn a Partiality to the Plaintiff. Sty. 462. Wood *v.* Gunſton. Mich. 7 C. 2.

87. In an Action of falſe Impriſonment the Jury found a Verdict for the Plaintiff with 2000 *l.* Damages, although the Plaintiff had been confined by her Mother only two or three Hours. A new Trial was granted on Account of the Exceſſiveneſs of the Damages. And by *Holt* Ch. J.—The Jury were ſhy of giving their Reaſon for their Verdict, thinking they had an abſolute Power to find it as they pleaſed. This is a Miſtake; for the Jury are to try the Cauſe with the Aſſiſtance of the Judge, and they ought to give their Reaſon for their Verdict, if required by the Judge ſo to do, that they may, in Caſe they proceed upon a miſtaken Notion, be ſet right. Comb. 357. Aſh *v.* Aſh. Hil. 8. W. 3.

88. In an Action for maliciouſly proſecuting an Indictment for Perjury there was a Verdict for the Plaintiff with a thouſand Pounds Damages; a new Trial was granted. And by the Court—It is fit the Defendant ſhould try another Jury, before he is finally charged with ſuch Damages. Str. 672. Chambers *v.* Robinſon. Hil. 12 G. 1.

89. In an Action of *Scandalum Magnatum* for theſe Words, *he is an unworthy Man and acts againſt Law and Reaſon*, the Jury found a Verdict for the Plaintiff with 4000 *l.* Damages. Upon a Motion for a new Trial it was ſworn, that one of the Jury had confeſſed, that they did not find ſuch large Damages becauſe they thought the Plaintiff ſo much damnified, but that he might have an Opportunity of ſhewing himſelf noble by remitting the Damages. A new Trial was refuſed. And by *North* Ch. J. in a criminal Caſe a Man is by *Magna Charta* to be fined with a *Salvo Contenemento ſuo*, and conſequently no greater Fine is to be impoſed than he is able to pay; but in a Civil Action the Plaintiff ought to recover a Compenſation for the Damages he has ſuſtained: And he ought in ſome Caſes to recover both for the Damages he has ſuſtained, and for thoſe which he may ſuſtain. In an Action for Words, if the Words are not actionable in themſelves, the Jury are only to conſider what Damages the Plaintiff has ſuſtained, and not what he may thereafter ſuſtain; becauſe for the latter he may have a new Action: But if the Words are in themſelves actionable, the Jury ought as well to conſider the Damages which the Plaintiff may afterwards ſuſtain as thoſe which he has ſuſtained In the preſent Caſe the Court cannot ſet a Value upon the Plaintiff's Honour. The Jury have given him 4000 *l.* Damages for the Injury thereto done, and as they are by Law the proper Judges of Damages, the Court has no Power to leſſen theſe, or to grant a new Trial. It would moreover be very improper, that the Court ſhould take Notice upon what Account the Jury found their Verdict as it is found. *Wyndham* J. was of the ſame Opinion. *Atkins* J. was of a different Opinion. And by him—In the Caſe of *Wood* v. *Gunſton*, which was an Action upon the Caſe for calling the Plaintiff Bankrupt, the Court granted a new Trial; becauſe the Damages of 500 *l.* found by the Jury were in the Opinion of the Court exceſſive. In the preſent Caſe the Jury ought only to have conſidered the Damages which the Plaintiff had ſuſtained, and not to have given large Damages, that he might have an Opportunity of ſhewing himſelf noble in remitting them. *Scroggs* J. was of Opinion with the Ch. J. And by him.—If I had been 2 Mod. 150. Lord Townſend *v.* Huges. Hil. 28. C. 2.

upon

upon the Jury I ſhould not have aſſeſſed ſuch large Damages: But as it does not appear, that there was any unfair Practice upon the Jury, a new Trial ought not to be granted. Suppoſe the Jury had found only a Penny Damages, the Court would not have granted a new Trial, in order to give the Plaintiff a Chance of obtaining larger Damages; and it would be equally unreaſonable to grant a new Trial, in order to give the Defendant a Chance of having leſſer Damages aſſeſſed.

2 Jon. 200. Boulſworth *v.* Pilkington, Hil. 33 C. 2.

90. In an Action for theſe Words ſpoken of a Tradeſman, *thou art a beggarly Rogue, go pay thy Debts*, the Jury found a Verdict for the Plaintiff with 800 *l.* Damages. A new Trial being moved for on Account of the Exceſſiveneſs of the Damages, it was refuſed; becauſe the Judge, before whom the Cauſe was tried, reported, that the Plaintiff had given the Defendant no Provocation, and that he believed the Jury had done what they thought to be right.

MS. Rep. Wilsford *v.* Berkley. Trin. 31 G. 2. in B. R.

91. In an Action for criminal Converſation with the Plaintiff's Wife there was a Verdict for the Plaintiff with 500*l.* Damages. Upon a Motion for a new Trial on Account of the Exceſſiveneſs of the Damages, it appeared from the Report of Lord *Manſfield* Ch. J. before whom the Cauſe was tried, that the Woman had ſeduced the Defendant, and that the Defendant was in low Circumſtances, being only a Clerk in the Exchequer at a Salary of about Fifty Pounds a Year. A new Trial was refuſed. And by Lord *Manſfield* Ch. J.—The Jury had all the Circumſtances under their Conſideration, and in an Action founded upon a *Tort* they are the proper Judges as to the *Quantum* of Damages.

MS. Rep. Leman *v.* Allen. Hil. 3 G. 3. in C. B.

92. In an Action of Treſpaſs and falſe Impriſonment there was a Verdict for the Plaintiff with 300*l.* Damages. A new Trial being moved for on Account of the Exceſſiveneſs of the Damages, it was refuſed; becauſe the Court did not upon the Circumſtances of the Caſe think the Damages exceſſive. It was in this Caſe ſaid by *Pratt* Ch. J. the Court may grant a new Trial on Account of the Exceſſiveneſs of the Damages, although the Action be founded upon a *Tort*, and conſequently the Jury have no certain Rule of computing Damages: But the Court ſhould be very cautious of granting one in ſuch Action, and ought not to do it, unleſs the Damages are ſuch, as do at the firſt Bluſh appear to be quite outrageous.

Salk. 645. Dent *v.* the Hundred of Hertford.

93. A new Trial was granted upon its being diſcovered, after the Trial, that the Foreman of the Jury had declared, that the Plaintiff ſhould never have a Verdict whatever Witneſſes he might produce.

1 Sid. 235. Goodman *v.* Cotherington.

94. If the Jury receive written Evidence after they are gone from the Bar to conſider of their Verdict, this is a good Reaſon for granting a new Trial.

Cro. Eliz. 189. Metcalfe *v.* Deane.

95. If after the Jury are gone from the Bar to conſider of their Verdict they hear the Evidence of a Witneſs who was before examined, the Verdict may be ſet aſide, notwithſtanding the Evidence were to the ſame Effect as the Evidence given in Court.

1 Sid. 235. Goodman *v.* Cotherington. Cro Eliz. 189.

96. But it is ſaid, that the Court will not in either of theſe Caſes grant a new Trial, unleſs it be indorſed upon the *Poſtea*, that the Jury did receive written or hear-parol Evidence after they were gone from the Bar; for that this cannot be ſhewn by Affidavit.

Salk. 645. King *v.* Burdett.

97. If the Jury carry written Evidence which was given in Court with them from the Bar, without the Direction or Leave of the Court, this is not a Reaſon for the granting of a new Trial: But the Jury are puniſhable.

Bunb. 51. Melliſh *v.* Arnold. 2 Lev. 140, 205.

98. A new Trial was granted, becauſe the Jury had thrown up Croſs or Pile, whether they ſhould give the Plaintiff Five Hundred or Three Hundred Pounds Damages.

99. The

99. The Jury drew Lots in order to determine for whom they ſhould find a Verdict. A new Trial was granted, notwithſtanding the Verdict was found for the Party, who in the Opinion of the Judge was intitled to a Verdict. Str. 642. Hale v. Cove.

100. The Court did in one Caſe refuſe to grant a new Trial, although the Jury found a general Verdict, after it was agreed by the Counſel on both Sides that a ſpecial one ſhould be found, and would not give their Reaſon for finding a general one. But it appears, that the new Trial was in this Caſe refuſed, becauſe it was moved for after a Trial at Bar. 7 Mod. 37. Gay v. Croſs.

101. In another Caſe, wherein a ſpecial Verdict was prayed, and the Jury, after being directed by the Judge before whom the Cauſe was tried to find a ſpecial Verdict, found a general Verdict, a new Trial was granted. 1. Will. 213. Reg. v. the Corp. of Bewdley.

102. A new Trial being moved for, becauſe the Jurors had voted and found their Verdict according to the Majority of Votes, it was refuſed. Comb. 14. Anon.

103. The Jurors had voted, and ſeven of them were for finding the Verdict as it was found. A new Trial being moved for, it was refuſed. And by *Lee* Ch. J.—Nothing was in this Caſe determined by Chance. The five Jurors might ultimately be convinced: But if they did only acquieſce in the finding of the Verdict that is ſufficient; and they ſhall not now be received to ſay, that they did not acquieſce. Sayer 100. Lawrence v. Boiwell.

5. On Account of a Neglect, or Miſtake, of a Counſellor or an Attorney in the Cauſe.

104. A new Trial is ſaid to have been granted; becauſe the Counſel for the Defendant, who did not expect that the Cauſe would be called on ſo ſoon, was abſent. But it is added by the Reporter, that a new Trial had in a ſimilar Caſe been refuſed. Salk. 645. Anon.

105. In a modern Caſe, a new Trial being moved for on Account of the Defendant's Attorney having neglected to attend the Trial, it was refuſed. And by the Court—As the Plaintiff has not been guilty of any Miſbehaviour or Fault, there ought not to be a new Trial, which as his Witneſſes may die or be out of the Way may be very inconvenient to him: Nor is it neceſſary to grant one; for the Defendant, who is bound by the Verdict, has a Remedy againſt his Attorney. MS. Rep. Clifton v. Grey, Mich. 31 G. 2. in B. R.

106. At the Trial of a Cauſe a Matter was mentioned by the Judge before whom it was tried; the Conſequence of which, if it had been relied upon, muſt have been a Verdict for the Defendant. Inſtead of relying upon this the Defendant's Counſel put his Defence upon another Matter, and there was a Verdict for the Plaintiff. A new Trial being moved for, it was refuſed. And by the Court—The Act of a Counſel in a Cauſe is to be conſidered as the Act of his Client; and conſequently, if the Counſel wave a Thing, which would have been in Favour of his Client, it is the ſame Thing as if the Client do himſelf wave it. The Miſtake of the Judge or the Jury is a good Reaſon for granting a new Trial: But the Miſtake of a Counſel is not. 10 Mod. 202, 203. Reg. v. the Corp of Helſton.

6. On Account of a Neglect, Miſtake, or Fault, of one of the Parties or one of his Witneſſes.

107. A new Trial being moved for, becauſe a Witneſs of the Party moving for it did not appear at the Trial, it was refuſed. And by the Court—If a new Trial were to be granted on this Account, one may be granted 1 Ventr. 30. Cotton v. Dainty.

in

in almoſt every Caſe; for it will be always in the Power of a Party to prevail upon one of his Witneſſes to be abſent, on Purpoſe to make his Abſence a Ground for obtaining a new Trial.

1 Barn. 322. Wheeler v. Pitt.

108. Upon a Motion for a new Trial, the Party moving for it offered an Affidavit, that one of his material Witneſſes did not appear at the Trial. The Court would not ſuffer the Affidavit to be read.

11 Mod. 141. Davis v. Daverell.

109. If the Appearance at the Trial of a material Witneſs for one Party were prevented by a Contrivance of the other Party, as by arreſting the Witneſs, this is a Reaſon for granting a new Trial.

11 Mod. 1. 6 Mod. 22.

110. If the Appearance at the Trial of a material Witneſs were prevented by a ſudden Illneſs, this is a Reaſon for granting a new Trial.

Salk. 645. Anon.

111. The Court refuſed to grant a new Trial, becauſe a material Witneſs did not appear at the Trial, unleſs the Witneſs would make an Affidavit of what he knew concerning the Matter in Queſtion; that the Court might judge of the Materiality of his Evidence.

Prec. in Ch. 194. Tovey v. Young.

112. It is ſaid, that a Court of Equity will grant a new Trial, if it appear, that a Witneſs, upon whoſe Teſtimony the Verdict was principally founded, ſtands convicted of an infamous Crime.

Salk. 653. Ford v. Tilly. 12 Mod. 584.

113. But it has been holden, that this is not a Reaſon for granting a new Trial. And by the Court—If the Record of the Conviction of ſuch a Witneſs had been produced at the Trial, the Judge would not have admitted his Teſtimony. As this was not done, the Party, who neglected to produce it, ought to ſuffer for his Neglect.

Salk. 273, 647, 653. Prec. in Ch. 194. Str. 691.

114. It is in divers Caſes laid down, that a new Trial ought not to be granted; becauſe the Party, who moves for it, was not at the Trial furniſhed with Evidence, which it was in his Power to have been furniſhed with.

12 Mod. 584.

115. It is ſaid in one Caſe, that if material Evidence, of which the Party had no Knowledge at the Trial, be afterwards diſcovered, this is a Reaſon for granting a new Trial: But it may be inferred, from what is laid down in a modern Caſe, that this Caſe is not Law.

MS. Rep. Walker v. Scott, Mich. 23 G. 2. in B. R.

116. In an Action for criminal Converſation with the Plaintiff's Wife there was a Verdict for the Plaintiff with 1000 *l.* Damages. A new Trial was moved for, upon an Affidavit of its having been diſcovered ſince the Trial, that the Woman was not the Wife of the Plaintiff. It was refuſed. And by the Court—It is an eſtabliſhed Rule, that a new Trial ought not to be granted upon the Account of Evidence diſcovered after the Trial, which by uſing due Diligence might have been diſcovered before. It is laid down in divers Caſes, that the Court will not grant a new Trial; becauſe one of the Parties was not at the Trial prepared to make out his Caſe. It would be of the moſt dangerous Conſequence to ſuffer one Party, after he has heard the Evidence of the other, to give new Evidence. In the preſent Caſe the Defendant ought to have been prepared at the Trial, to have proved that the Woman was not the Plaintiff's Wife; which was the very Giſt of the Action.

Sayer 28. Huiſh v. Sheldon.

117. A new Trial being moved for, upon an Affidavit that a material Witneſs had made a Miſtake in giving his Evidence at the Trial, it was refuſed. And by the Court—It would be of the moſt dangerous Conſequence to ſet aſide a Verdict, becauſe a Witneſs has from Inattention, or from the Want of being prepared, made a Miſtake in giving his Evidence.

11 Rep. 18. Lady Herbert v. Shaw.

118. It is one Caſe laid down, that Embracery is a good Reaſon for granting a new Trial: but that Maintenance is not.

2 Ventr. 173. Anon. Paſch. 3 W. 3.

119. Upon a Motion for a new Trial it appeared, that the Plaintiff's Attorney had written Letters to two Perſons upon the Pannel, importuning them

them to appear, and ſetting forth the Hardſhips his Client had ſuffered. A new Trial was granted, and the Attorney, who was committed for having been guilty of Embracery, was obliged to pay Ten Pounds to the other Party by Way of Coſts, before the Court would conſent to his being diſcharged.

120. It was in a ſubſequent Caſe holden, that although one of the Parties have deſired a Perſon to appear as a Juryman, this not a good Reaſon for granting a new Trial. Str. 643. Snell v. Timbrel, Mich. 12 G. 1.

121. The latter Caſe is ſaid to have been determined upon the Authority of the Caſe of Lady *Herbert* v. *Shaw*. But the Caſe alluded to does not ſeem to warrant the Determination. Ibid.

122. In that Caſe the Duke of *Leeds* had written Letters to all the Perſons upon the Pannel; every one of which Letters, after deſiring the Perſon to appear at the Trial, concluded with theſe Words, "Which I ſhall take "as a great Obligation, and ſhall be glad of an Occaſion to ſhew you how "much I am Sir your humble Servant." A new Trial being moved for on Account of theſe Letters, it was refuſed upon the particular Circumſtance of the Caſe; namely, that the Defendant, who had had Notice long before the Trial of theſe Letters, did not move for a Trial at Bar, which the Plaintiff had offered to conſent to: But it was ſaid by the Court, that a Letter of this Kind is of the moſt dangerous Conſequence, it being a Temptation to a Juryman to be partial. 11 Mod. 119. Lady Herbert v. Shaw.

123. A new Trial was moved for; becauſe the Plaintiff, in whoſe Favour the Verdict was, had after it was brought in given to every one of the Jurors Four Pounds; whereas by a Rule of the Court they were intitled to no more than Twenty Shillings each. The Court being equally divided, no Rule could be made. *Morton* J. and *Rainsford* J. were of Opinion, that although the Plaintiff may be puniſhable for Diſobedience to the Rule of the Court, there was no Reaſon for granting a new Trial: *Keeling* Ch. J. and *Twiſden* J. were of Opinion, that a new Trial ought to be granted; for that, if either Party may give what he pleaſe to the Jurors after the Verdict is brought in, the Jurors will be frequently inclined to find a Verdict for that Party who is beſt able to reward them. 1 Ventr. 30. Cotton v. Daintry.

7. In an Action of Ejectment.

124. It is laid down in divers Caſes, that the Court will not grant a new Trial in an Action of Ejectment; becauſe another Action of Ejectment may be brought, and conſequently, there is no Neceſſity for granting a new Trial. 1 Jon. 225. Salk. 648, 650. Ld. Raym. 514.

125. And in one Caſe it is ſaid, that the Court will not grant a new Trial in an Action of Ejectment, unleſs the Caſe be ſo circumſtanced, that Juſtice cannot otherwiſe be attained. Str. 1106. Dormer v. Parkhurſt, Hil. 12 G. 2.

126. But theſe Caſes do not ſeem to be Law; for in one modern Caſe it is ſaid, that the Court will not grant a new Trial in an Action of Ejectment, where the Verdict is for the Defendant; from whence it may fairly be inferred, that where the Verdict is for the Plaintiff a new Trial may be granted. 1 Barn. 323. Brown v. Petcher, Mich. 8 G. 2.

127. And in a very modern Caſe it is expreſsly laid down, that where the Verdict is for the Plaintiff, the Court will grant a new Trial as readily in an Action of Ejectment as in any other Action. A Motion being made for a new Trial in an Action of Ejectment, it was refuſed upon the particular Circumſtances of the Caſe. But by Lord *Mansfield* Ch. J.—It is not in B. R. MS. Rep. Wright on the Dem. of Clymer v. Littler, Mich. 2 G. 3.

not true, that the Court will not in any Caſe grant a new Trial as readily in an Action of Ejectment as in any other Action. If the Verdict be for the Defendant, the Court will not grant a new Trial but for very particular Reaſons; becauſe, as the Verdict in an Action of Ejectment is not concluſive, the Plaintiff may bring another Action of Ejectment: But where the Verdict is for the Plaintiff, the Court will grant a new Trial as readily in an Action of Ejectment as in any other Action, and the Court ought ſo to do; for if the Poſſeſſion ſhould be changed in Conſequence of the Verdict, it would ſometimes anſwer no Purpoſe for the Party who has loſt the Poſſeſſion, which was perhaps his only Title, to be at Liberty to bring another Action of Ejectment.

8. In a Penal Action.

Str. 899. Seymour Quitam v. Day.

128. In an Action for the Penalty given for killing a Hare the Jury, contrary to the Direction of the Judge before whom the Cauſe was tried, found a Verdict for the Defendant. A new Trial being moved for, it was refuſed on Account of the Action being penal.

1 Barn. 316. Phillips Qui tam v. Scullard.

129. In an Action for the Penalty given for ſelling leſs than two Gallons of Spirituous Liquors the Fact was proved: And *Eyre* Ch. J. before whom the Cauſe was tried, directed the Jury to find a Verdict for the Plaintiff. Notwithſtanding this Direction a Verdict was found for the Defendant; yet a new Trial was refuſed.

Bunb. 253. Robinſon Qui tam v. Lequeſne, Trin. 1 G. 2.

130. In an Action for the Penalty given for a fraudulent Exportation of Jeſuits Bark the Verdict was for the Defendant. A Motion being made for a new Trial; it was refuſed. The Reporter of this Caſe, after ſaying it ſeemed to be admitted, that a new Trial may upon the particular Circumſtances of the Caſe be granted in a penal Action adds, that the Counſel for the Plaintiff were prepared with Precedents in which it had been done: But he does not mention, where any ſuch Precedent is to be met with, and the contrary is laid down in a ſubſequent Caſe.

Str. 1238. Matthinſon Qui tam v. Allanſon, Mich. 18 G. 2.

131. An Action being brought for the Penalty given by the Statute againſt Horſe-Racing, the Jury found a Verdict for the Defendant. The Verdict being contrary to Evidence, a new Trial was moved for. A new Trial was refuſed. And by the Court—As there does not appear to have been any unfair Practice of the Defendant, this Caſe is within the Reaſon of the Practice of the Court of *Exchequer*, in which Court a new Trial is never granted at the Inſtance of the Plaintiff in an Action for a Penalty, unleſs the Defendant have been guilty of unfair Practice.

9. In an Indictment or Information.

1 Sid. 154. 1 Lev. 124. Ld. Raym. 63. 12 Mod. 9.

132. If the Defendant in an Indictment or Information have been acquitted, the Court will not grant a new Trial, notwithſtanding the Verdict were contrary to Evidence.

Salk. 646. Rex v. Bear.

133. A new Trial being moved for, after an Acquittal in an Indictment for a Libel, becauſe the Verdict was contrary to Evidence, it was refuſed. And by the Court—A new Trial ought not to be granted after an Acquittal in a criminal Caſe, unleſs the Defendant have been guilty of unfair Practice.

1 Show. 336. Rex v. Davis. 12 Mod. 9.

134. The Defendant in an Information for a Riot being acquitted, a new Trial was refuſed, although the Verdict was, in the Opinion of the Judge before whom the Information was tried, contrary to Evidence; becauſe

cauſe it did not appear, that the Verdict was obtained by unfair Practice of the Defendant.

135. The Defendant in an Information in the Nature of a *quo Warranto* being acquitted a new Trial was moved for, and the Judge, before whom the Information was tried, reported that the Verdict was in his Opinion contrary to Evidence. The Court of King's Bench being equally divided in Opinion, whether a new Trial could be granted after an Acquittal in ſuch Information, the Caſe was adjourned to be argued before all the Judges, who being likewiſe equally divided in Opinion, the Rule to ſhew Cauſe why a new Trial ſhould not be granted was diſcharged. Str. 101. Rex v. Bennet.

136. A new Trial was moved for, becauſe the Verdict, which was for the Defendant in an Information in the Nature of a *quo Warranto*, was contrary to Evidence. The Court refuſed to grant a Rule to ſhew Cauſe. And by *Lee* Ch. J.—In the Caſe of the *King* v. *Bennet* the Judges were equally divided in Opinion, whether a new Trial could in ſuch Caſe be granted; and in the Caſe of the *King* v. *Jones*, which was in *Trin.* 12 *G.* 1. wherein the ſame Queſtion aroſe, a new Trial was not granted, the Court being equally divided in Opinion upon the Queſtion. Sayer 102. Rex v. Blunt.

137. It is laid down, that if the Acquittal in an Indictment have been procured by a Trick or Fraud of the Defendant, he may be puniſhed for the Trick or Fraud: But that the Court cannot grant a new Trial. 1 Sid. 153. 1 Lev. 9.

138. But it is in one Caſe ſaid, that, although the Court will not grant a new Trial after an Acquittal in an Indictment, becauſe the Verdict was contrary to Evidence, the Court may grant a new Trial, in Caſe the Acquittal were procured by a Trick or Fraud of the Defendant. Salk. 646. Rex v. Bear.

139. In one Caſe a new Trial was granted, after the Defendant in an Indictment for keeping a Bawdy-Houſe had been acquitted; becauſe the Trial was brought on by the Defendant, and he had not given due Notice of Trial. 12 Mod. 9. Reg. v. Coke.

140. In another Caſe a new Trial was for the ſame Reaſon granted, after an Acquittal upon an Indictment. Sayer 90. Rex v. Furſer.

141. It is in one Caſe ſaid to have been holden, that the Court cannot grant a new Trial, at the Inſtance of the Defendant, in an Indictment or Information without the Conſent of the King's Counſel. 1 Sid. 50. Read v. Dawſon, Mich. 13 C. 2.

142. But it was in a ſubſequent Caſe holden, that the Court may grant a new Trial, at the Inſtance of the Defendant, in an Indictment or Information without the Conſent of the King's Counſel; and it is in this Caſe ſaid, that Mr. *Siderfin* is miſtaken in his Report of the Caſe of *Read* v. *Dawſon*. Ld. Raym. 63. Rex v. Stone. Mich. 3 W. 3.

143. A new Trial cannot be moved for, by the Defendant in an Indictment or an Information, after an Interlocutory Judgment has been ſigned. Str. 1102. Rex v. Armſtrong.

144. Upon a Motion for a new Trial, at the Inſtance of the Defendant, in an Indictment for Forgery, it was inſiſted, that it was not neceſſary for him to be preſent at making the Motion; for that this Caſe is different from the Caſe of a Motion in Arreſt of Judgment. It was holden, that the Defendant muſt be preſent when ſuch Motion is made. And by the Court. The Verdict fixes ſo great a Suſpicion of Guilt upon the Defendant, that the Court will always be ſure of him, before they intimate an Opinion concerning the granting of a new Trial; and the Chief Juſtice mentioned two Caſes, in which the Diſtinction attempted to be made in this Caſe had been over-ruled. Str. 968. Rex v. Gibſon.

TROVER.

THE Word *Trover* is derived from the *French* Word *Trouver*, which ſignifies to find.

It is probable from the Name of an Action of *Trover*, that it could not at its Commencement be brought for the Converſion of Goods, unleſs they came to the Defendant's Poſſeſſion by an actual Finding: But whether this were ſo or not, it is at this Day uſual, to bring this Action for the Converſion of Goods which came to the Defendant's Poſſeſſion by a Finding in Law, as well as for the Converſion of Goods which came to his Poſſeſſion by an actual Finding.

Divers Things relative to an Action of *Trover*, as Tender and bringing Money into Court, Damages and Coſts, have been treated of under the Titles *Tender and bringing Money into Court*, *Damages* and *Coſts*.

The remaining Matter, which appertains to this Title, ſhall be ranged in the following Order.

(A) Of an Action of Trover in the general.
(B) Of a Converſion.
(C) Who may bring an Action of Trover.
(D) For what Injuries an Action of Trover lies.
(E) Againſt whom an Action of Trover may be brought.
(F) Of the Pleadings in an Action of Trover.

1. Of the Declaration.
2. Of the Plea.

(G) Of Evidence in an Action of Trover.

(A) Of an Action of Trover in the general.

1. IF one Perſon who has found the Goods of another convert them an Action of Trover lies.

2 Bulſt. 313. Iſaac v. Clerk.

2. If one Perſon who came to the Poſſeſſion of the Goods of another by Delivery convert them an Action of Trover lies; for although there be not in ſuch Caſe an actual Finding, there is a Finding in Law, which is ſufficient to found this Action upon.

3. If the Goods of *J. S.* have been taken by *J. N.* in ſuch a tortious Manner that an Action of Treſpaſs would lie, an Action of Trover will likewiſe lie; but *J. S.* can only recover in the latter Action Damages for the Converſion of the Goods; inaſmuch as he does, by electing to bring an Action of Trover, wave his Right to recover Damages for the tortious taking. Cro. Eliz. 824. Biſhop *v.* Lady Montague. Clayt. 113. Cro. Ja. 50. Cro. Car. 89. 1 Mod. 31. Str. 128.

4. Wherever an Action of Trover lies, an Action of Detinue does likewiſe lie; but the latter Action is very ſeldom brought; becauſe the Defendant may wage his Law therein. 2 Roll. Rep. 447. Goodwin *v.* Harwood.

5. There is another Reaſon for preferring an Action of Trover to one of Detinue; namely, that in the latter Action the Plaintiff can only recover the Goods in *Specie*, whereas in the former he may recover Damages for the Converſion. Cro. Ja. 130. 2 Roll. Abr. 5.

6. If the Plaintiff in an Action of Trover have recovered Damages for the Converſion of Goods, the Property in the Goods does thereupon veſt in the Defendant; who, as Damages to the Value of the Goods have been recovered againſt him, is to be conſidered as a Purchaſer. Str. 1078. Adams *v.* Broughton.

(B) Of a Converſion.

1. EVERY aſſuming by one Perſon, to diſpoſe of the Goods of another as if they were his own, is a Converſion. 6 Mod. 212. Clayt. 112.

2. If *J. S.* take the Goods of *J. N.* unlawfully, this is a Converſion; ſuch taking being a diſpoſing of the Goods as if they were the Goods of *J. S.* 1 Sid. 264. Bruen *v.* Roe Clayt. 112.

3. If one Perſon diſpoſe of the Goods of another for the Benefit of a third Perſon, this is a Converſion; for the Injury to the Owner of the Goods is the ſame, as if they had been diſpoſed of for the Benefit of the Diſpoſer. Sayer 41. Perkins *v.* Smith.

4. If the Goods of *J. S.* are delivered to *J. N.* by a Perſon not having a lawful Authority to deliver them, and *J. N.* ſell them, it is equally a Converſion, as if *J. N.* had himſelf taken the Goods. Ibid.

5. The ſevering of a Thing from a Freehold, as taking down the Door of a Houſe, is not a Converſion; for a Converſion can only be of a perſonal Chattel. Cro. Ja. 129. Wood *v.* Smith.

6. But if a Thing which has been ſevered from a Freehold be carried away; as if *J. S.* do carry away a Tree the Property of *J. N.* which was cut down by himſelf or by any other Perſon, this is a Converſion. Noy 125. Skidneſs *v.* Hodſon.

7. If *J. S.* dig Coals in a Pit of *J. N.* and throw them out of the Pit, he is guilty of a Converſion; becauſe, as the Coals after being dug were a perſonal Chattel, throwing them out of the Pit was a diſpoſing of them as if they were the Coals of *J. S.* 1 Jo. 245. Player *v.* Roberts.

8. If *J. S.* who came to the Poſſeſſion of the Goods of *J. N.* by Finding, loſe them, or they be taken from him, *J. S.* is not guilty of a Converſion; becauſe he does not in either Caſe diſpoſe of the Goods as if they were his own. 1 Leon. 223. Vandrink *v.* Archer. 1 Roll. Abr. 6. L. pl. 4. Bro. Detin. pl. 40.

9. If

2 Bulſtr. 280. Bird v. Aſtcock.

9. If Goods, in order to prevent the ſinking of a Ship, are thrown by the Maſter of the Ship into the Sea, this is not a Converſion; becauſe, ſo far from diſpoſing of the Goods as if they were his own, the Maſter only does what is neceſſary for the Preſervation of the Ship and the Lives of the Perſons on Board.

Bro. Treſp. pl. 323. Cro. Eliz. 329.

10. If the Goods of *J. S.* which were illegally taken by *J. N.* are retaken by *J. S.* this is not a Converſion; it being lawful for *J. S.* to retake the Goods.

Cro. Eliz. 870. Ledeſham v. Lenham.

11. If a Stake-holder deliver Money, depoſited in his Hands by *A.* on Account of a Wager, to *B.* who won the Wager, this is not a Converſion; for, as *B.* has won the Wager, the Stake-holder does no more than deliver his own Money to *B.*

Yelv. 194. Gomerſale v. Medgate.

12. Every unlawful intermeddling by one Perſon with the Goods of another is a Converſion, it being a diſpoſing *pro tanto* of the Goods of another as if they were the Goods of the Intermeddler.

1 Roll. Abr. 5. Countels of Rutland's Caſe. 6 Mod. 212.

13. If the Horſe of *J. S.* be taken and ridden by *J. N.* this is a Converſion, it being an unlawful intermeddling with the Horſe.

Cro. Ja. 148. Bagſhaw v. Goward. Brownl. 5.

14 If *J. S.* who lawfully diſtrained a Beaſt, work it, this is a Converſion; becauſe the working of the Beaſt is an unlawful Intermeddling therewith.

Cro. Ja. 148. Bagſhaw v. Goward.

15. But if *J. S.* after having lawfully diſtrained a Milch Cow belonging to *J. N.* milk it, this is not a Converſion; for as milking the Cow, which prevents its being ſpoiled, is for the Benefit of *J. N.* it is lawful to milk it.

2 Mod. 244.

16. If *J. S.* who lawfully diſtrained a Beaſt, impound it in a proper Pound, this is not a Converſion; becauſe he does nothing more than put the Beaſt into the Cuſtody of the Law.

Cro. Ja. 148, 225. Yelv. 194.

17. If *J. S.* after having lawfully diſtrained Goods for Rent in Arrear had heretofore ſold them, this would have been a Converſion.

18. But by the 2 *W. & M. c.* 5. *par.* 1. it is enacted, "That where "Goods are diſtrained for Rent due upon a Demiſe, Leaſe or Contract, "the Perſon diſtraining may cauſe the Goods to be ſold."

1 Leon. 224. Waldgrave v. Ogden. Cro. Eliz. 219.

19. If a Perſon, to whom Apparel was delivered to be kept, wear it, this is a Converſion; the wearing of the Apparel being an unlawful Intermeddling therewith.

1 Leon. 224. Waldgrave v. Ogden. Cro. Eliz. 219. 2 Bulſtr. 312.

20. But if ſuch Apparel be eaten by Moths; this, notwithſtanding the Injury was owing to Negligence in keeping the Apparel, is not a Converſion; becauſe the Injury does not ariſe from a Malfeaſance.

1 Leon. 224. Waldgrave v. Ogden. 2 Bulſtr. 312. Cro. Eliz. 219.

21. If a Man, who found Apparel, wear it, this is a Converſion; the wearing of the Apparel being an unlawful Intermeddling therewith.

1 Leon. 224. Waldgrave v. Ogden. 2 Bulſtr. 312. Cro. Eliz. 219.

22. But if, by Reaſon of Negligence in keeping ſuch Apparel, it be eaten by Moths, this is not a Converſion; becauſe the Injury does not ariſe from a Mal-feaſance.

Bro. Detin. pl. 40. 1 Leon. 223, 224. Owen 141. Cro. Eliz. 219.

23. And there is ſome Doubt whether an Action upon the Caſe does in ſuch Caſe lie; for it is laid down in divers Books, that the Perſon, who came to the Poſſeſſion of the Goods of another by Finding, is not obliged to

to take ſo much Care of them, as if he had come to the Poſſeſſion thereof by Delivery.

24. But it is in one Book laid down, that an Action upon the Caſe lies for Negligence in keeping Goods which were found; inaſmuch as, it is the Duty of the Finder of Goods to keep them ſafely for the Owner. 2 Bulſtr. 312. Iſaac v. Clark.

25. If the Corn of *J. N.* be carried by *J. S.* to a Mill, and the Miller after being forbidden ſo to do by *J. N.* grind it, this is a Converſion; the Grinding of the Corn being an unlawful Intermeddling therewith. Clayt. 57. Holſworth's Caſe.

26. If one Man, after drawing Part of the Wine of another out of a Veſſel, put as much Water into the Veſſel as he drew out Wine, this is a Converſion of all the Wine; becauſe the whole is thereby damaged if not ſpoiled. Str. 576. Richardſon v. Atkinſon.

27. A Maſter of a Ship, who had contracted with a Seaman to go a Voyage, after the Seaman came on board refuſed to pay him according to the Contract. Hereupon the Seaman deſired to carry away ſome Goods, which he had brought on board with him. The Maſter would not permit him to do this, and ſaid he ſhould not carry them away until he had examined them, which he refuſed to do at that Time. This was holden to be a Converſion. 12 Mod. 344. Anon.

28. If *J. S.* who came to the Poſſeſſion of Goods the Property of *J. N.* by Finding, do not abſolutely refuſe to deliver the Goods to *J. N.* and do only ſay, that he does not know whether *J. N.* be the Owner of them, this is not a Converſion. 2 Bulſt. 312. Iſaac v. Clark.

29. A Piece of Timber the Property of *J. S.* being in the Field of *J. N.* *J. S.* aſked Leave to fetch it away. *J. N.* refuſed to give Leave: But he did never intermeddle therewith. It was holden, that, as *J. N.* did never intermeddle with the Piece of Timber, his Refuſal of Leave to fetch it away was not a Converſion. 2 Bulſt. 310. Iſaac v. Clark. 2 Mod. 245.

30 Upon the Cuſtom-Houſe Key there is a Hut, wherein certain Porters lodge Goods, until the Ships, in which the Goods are to be put on board, are ready to receive them. Every one of theſe Porters has a Cupboard in the Hut for the ſeparate Uſe of himſelf. The Plaintiff, who was one of theſe Porters, put Goods into the Hut, which he laid in ſuch a Manner that the Defendant, who was another of them, could not well come to his Cupboard without removing them. The Defendant, in order to come to his Cupboard, removed the Goods about a Yard nearer to the Door of the Hut, and left them there. The Goods being afterwards loſt, the Queſtion was, whether this Removal of them did amount to a Converſion. It was ruled that it did not. And by *Pratt* C. J.—The Plaintiff, by laying his Goods in ſuch Manner as to prevent the Defendant from coming to his Cupboard, was a Wrong-doer, and conſequently, it was lawful for the Defendant to remove them. If an Action upon the Caſe had been brought, it would even then have been doubtful, whether the Defendant was bound to return the Goods to the Place from whence he had removed them: But it is quite clear, that he is not guilty of a Converſion; becauſe the Injury if any aroſe from a Non-feaſance. Str. 128. Buſhel v. Miller.

31. It is laid down in divers Books, that if *J. S.* who came to the Poſſeſſion of the Goods of *J. N.* by the Delivery of *J. N.* refuſe to deliver them to *J. N.* this is only Evidence of a Converſion and not an actual Converſion. 1 Roll. Abr. 5. Iſaac v. Clark. Hob. 187. 2 Show. 179.

32. It is in other Books laid down, that a Refuſal to deliver Goods, to the Perſon in whom the general Property is, is an actual Converſion; although the Perſon, who refuſes, did come to the Poſſeſſion of the Goods, by the Delivery of the Perſon in whom the general Property is. Moor 460. Cro. Car. 262. 6 Mod. 112.

2 Mod. 244, 245. Mires v. Solebay. 10 Rep. 57.

33. The Queſtion, whether there has been a Converſion, is ſo intirely for the Conſideration of the Jury, that the Court cannot ſupply by Intendment the Want of its being expreſsly found by the Verdict; for the Court can never intend a Perſon to have been a Wrong-doer.

(C) Who may bring an Action of Trover.

Bro. Treſp. pl. 303. Latch 214. 2 Bulſtr. 268.

1. THE Perſon, in whom the general Property in a perſonal Chattel is, may maintain an Action of Trover for the Converſion thereof, although he have never been in the actual Poſſeſſion thereof; becauſe a general Property does in the Caſe of a perſonal Chattel draw to it a Poſſeſſion in Law, and ſuch Poſſeſſion is by Reaſon of the tranſitory Nature of a perſonal Chattel ſufficient to found this Action upon.

Bro Treſp. pl. 303. Latch 214.

2. If the Perſon, in whom the general Property in Goods which lie at *York* is, give them to *J. S.* who is at *London* at the Time of the Gift, and before *J. S.* obtain the actual Poſſeſſion of the Goods a Stranger convert them, an Action of Trover lies; becauſe *J. S.* did acquire a general Property in the Goods by the Gift.

Bro. Treſp. pl. 150.

3. But if the Giver of the Goods had been an Infant, *J. S.* could not have maintained this Action for the Converſion thereof: becauſe no Perſon does acquire a general Property in Goods by the Gift of an Infant.

Bro Treſp. pl. 216.

4. If the Bailee of Goods give them to *J. S.* but do not deliver them, and a Stranger convert the Goods, an Action of Trover does not lie; becauſe, as the Goods were not delivered, *J. S.* did not acquire a general Property in them by the Gift of the Bailee, who had only a ſpecial Property therein.

2 Bulſt. 268. Fiſher v. Young.

5. If Goods, which were the Property of a Teſtator, are converted by a Stranger before the Teſtator's Will is proved, and the Perſon appointed Executor do afterwards prove the Will, he may maintain an Action of Trover: For, although an Executor have no Property in the Goods of his Teſtator until he has proved his Will, as ſoon as this is done, he does by Relation acquire a general Property therein from the Time of his Teſtator's Death.

Bro. Treſp. pl. 25.

6. If a Teſtator have bequeathed ſpecifick Goods, the Legatee may maintain an Action of Trover for the Converſion thereof by a Stranger, although they have not been delivered to him by the Executor; becauſe a general Property in the Goods was veſted in him immediately upon the Death of the Teſtator.

Ibid.

7. But if a Teſtator have bequeathed a third Part of his Goods to *J. S.* and before any of the Teſtator's Goods are delivered by his Executor to *J. S.* all the Goods are converted by a Stranger, *J. S.* cannot maintain this Action; becauſe, until his Part thereof is aſcertained by Delivery of the Executor, he has not a general Property in any of the Teſtator's Goods.

Fitz. N. B. 91. 6 Mod. 8, 149.

8. If wrecked Goods are converted by a Stranger, before they are ſeiſed by *J. S.* in whom the Right of Wreck is, *J. S.* may maintain an Action of Trover; a general Property in the Goods being veſted in him.

3 Leon. 113. Nelthorpe v. Farrington.

9. It is in the general true, that if two Perſons are Owners of a Perſonal Chattel, one of them cannot maintain an Action of Trover for the Converſion thereof by a Stranger.

10. But

10. But in order to encourage the building of Ships, it has been holden, that the Owner of an Eighth, or any other Part of a Ship, may maintain this Action for the Converſion of ſuch Part by a Stranger. Skin. 640. Dockwray *v.* Dickenſon.

11. And it is ſaid, that if a Man bring this Action againſt a Stranger for the Converſion of a whole Ship, and it come out in Evidence that only the Sixteenth Part thereof is his Property, he may recover Damages to the Value of this Part. Ibid.

12. *A.* ſeiſed in Fee of Land ſold twenty Trees thereon growing to *B.* and his Aſſigns, which were to be ſet out by *A.* and felled by *B.* After *B.* had aſſigned his Intereſt therein to *C.* *A.* ſet out the twenty Trees, and *C.* felled them. The Trees being afterwards taken away by *D.* *C.* brought an Action of Trover. The Action was holden to be maintainable; for that the Intereſt of *B.* which was ſaid to be more than either a Choſe in Action or a poſſible Intereſt, was aſſignable. 5 Rep. 24. Palmer's Caſe.

13. *A.* was Tenant for Life of Land without Impeachment of Waſte, except the Waſte were voluntary, with Reverſion to *B.* After *B.* had ſold ſome Trees growing upon the Land to *C.* *A.* cut down the Trees and ſold them to *D.* who took them away. An Action of Trover being hereupon brought by *C.* it was holden, that the Action did not lie; for that *B.* had not a Power to ſell Trees growing upon the Land during the Life of *A.* Cro. Car. 279. Waller *v.* Sands.

14. If Goods be delivered by *A.* to *B.* in order that *B.* may deliver them to *C.* and *B.* inſtead of delivering the Goods convert them, *C.* may maintain an Action of Trover. 2 Bulſtr. 68. Flewellin *v.* Rave. Ld. Raym. 276.

15. If two Perſons do each ſtake a Sum of Money in the Hands of a third Perſon by Way of Wager, he who wins the Wager may, in caſe the Stake-holder refuſe to deliver it, maintain an Action of Trover for the whole Money. Cro. Eliz. 870. Ledeſham *v.* Lubram.

16. *A.* granted a Leaſe of the Coalmines already opened, or which ſhould thereafter be opened, upon his Manor of *B.* to *C.* for the Term of ninety-nine Years. During the Term *D.* the Son of *A.* opened a Mine in a Copyhold Eſtate belonging to *E.* which was Parcel of the Manor, and dug and carried away Coals. An Action of Trover being brought by *C.* for the Converſion of the Coals carried away, it was holden that the Action was maintainable. 1 Jon. 243. Player *v.* Roberts.

17. The Perſon, in whom the general Property in Goods is, may in ſome Caſes maintain an Action of Trover for the Converſion thereof by a Stranger, although another Perſon had at the Time of the Converſion a ſpecial Property in the Goods. 2 Roll. Abr. 569. P. pl. 5. 1 Sid. 438.

18. If Goods which were bailed by *J. S.* to *J. N.* be loſt by *J. N.* and be afterwards converted by a Stranger, *J. S.* may by Reaſon of his general Property in the Goods maintain an Action of Trover. 2 Roll. Abr. 569. P pl. 5.

19. But if the Bailee of Goods give them to a Stranger and deliver them, the Bailor cannot maintain this Action; for by the Gift and Delivery of a Perſon, who has a ſpecial Property in and a Poſſeſſion in Fact of the Goods, the general Property of the Bailor is directed. Bro. Treſp. pl. 216. pl. 295.

20. If a Servant, who had a general Authority to receive and pay Money for his Maſter, give the Money which he received of *J. N.* for the Uſe of his Maſter to *J. S.* and deliver it to him, the Maſter may maintain an Action of Trover; becauſe, as the Servant had only an Authority to receive the Money, it muſt be intended that his Poſſeſſion was Poſſeſſion of his Maſter, and conſequently, he had not ſuch a ſpecial Property in the Money, as did enable him to transfer the general Property by a Gift, notwithſtanding there was a Delivery. Salk. 289. Anon. Cro. Eliz. 638.

Fitz. N B. 89, 92. 1 Inſt. 89. Bro. Treſp. pl. 83. 4 Rep. 84. 2 Roll. Abr. 569 pl. 5.

21. It is in the general true, that wherever one Perſon is anſwerable to another, in whom the general Property is, for Goods of which he once had a Poſſeſſion in Fact, he has ſuch a ſpecial Property in the Goods, as does enable him to maintain an Action of Trover for the Converſion of them by a Stranger.

pl. 7. 1 Sid. 438. 2 Saund. 47.

Bro. Treſp. pl. 92. Ld. Raym. 913, 915.

22. If *J. S.* have bailed a Beaſt to *J. N.* for ploughing his Land, and the Beaſt be converted by a Stanger, *J. N.* may maintain an Action of Trover; becauſe, as the Beaſt was delivered to *J. N.* for a Purpoſe beneficial to himſelf, he is anſwerable for it to the Bailor.

1 Sid. 438. Wilbraham *v* Snow. 1 Mod. 31.

23. If the Goods taken by a Sheriff in Execution are converted by a Stranger, the Sheriff may maintain an Action of Trover; becauſe he is anſwerable to the Perſon for whom the Goods were taken.

2 Rep. 84. Salk. 26, 145. 1 Mod. 31.

24. If the Goods of *J. S.* which were delivered to *J. N.* to be carried for Hire, are converted by a Stranger, *J. N.* may maintain an Action of Trover; becauſe he is anſwerable to *J. S.*

Bro. Treſp. pl. 67. Moor 543.

25. The Agiſtor of a Beaſt may maintain an Action of Trover, for the Converſion thereof by a Stranger; becauſe he is anſwerable to the Owner of the Beaſt.

Fitz. N. B. 92. 1 Ventr. 89. 1 Mod. 65.

26. Churchwardens may maintain an Action of Trover, for the Converſion of Goods belonging to their Church by a Stranger during their Churchwardenſhip; becauſe they are anſwerable to their Succeſſors.

Fitz. N. B. 89, 92.

27. And it is ſaid, that Churchwardens may maintain this Action, for the Converſion of Goods belonging to their Church by a Stranger during the Churchwardenſhip of their Predeceſſors.

Dyer 48.

28. But it may be inferred, from what is ſaid in another Book, that Churchwardens cannot maintain this Action, for the Converſion of Goods belonging to their Church by a Stranger during the Churchwardenſhip of their Predeceſſors.

Str. 505. Armory *v.* Delamire.

29. The Finder of a Jewel, although he do not acquire by the Finding a general Property therein, may maintain an Action of Trover againſt a Stranger who converts it: Becauſe, as the Finder is anſwerable for the Jewel to the Perſon in whom the general Property is, he has a ſpecial Property therein. He has moreover a Right to the Jewel as againſt every Perſon, except the Perſon who loſt it.

4 Rep. 84. Southcote's Caſe. 1 Inſt. 89.

30. It was formerly holden, that if Goods, which have been delivered generally to be kept, are converted by a Stranger, the Bailee may maintain an Action of Trover; becauſe he is anſwerable for the Goods to the Perſon in whom the general Property is: But that if Goods, which have been delivered to be kept as the Bailee keeps his own Goods, are converted by a Stranger, the Bailee cannot maintain this Action; becauſe he is not anſwerable for the Goods to the Perſon in whom the general Property is.

Ld. Raym. 913, 914, 915. Coggs *v.* Barnard.

31. But in a modern Caſe, in which *Southcote*'s and all the old Caſes ſeem to have been well conſidered, this Diſtinction is exploded; it being therein laid down, that the Bailee of Goods, which have been delivered generally to be kept, is not anſwerable to the Perſon in whom the general Property is, for the Converſion thereof by a Stranger, unleſs the Converſion be owing to ſome groſs Neglect of his; for that it would be very unreaſonable, that a Perſon, who receives no Advantage from keeping the Goods of another, ſhould at all Events be anſwerable for the Converſion thereof.

32. It is upon the whole clear, that both the Perſon in whom the general Property in Goods is, and the Perſon in whom the ſpecial Property therein is,

is, may maintain an Action of Trover for the Converſion thereof by a Stranger.

33. But if either of theſe has recovered Damages for the Converſion of the Goods, this does ouſt the other of his Right of Action; for it would be very unreaſonable, that a double Satisfaction ſhould be made for the Converſion of the Goods. 2 Roll. Abr. 569 P. pl. ..

(D) For what Injuries an Action of Trover lies.

1. IT has been holden, that a Perſon cannot have ſuch Property in a Negro in *England*, as will enable him to maintain an Action of Trover for converting the Negro; and that he can only recover, as he may in the Caſe of any other Servant, Damages for the Loſs of Service. Ld. Raym. 146. Chamberlain *v.* Hervey, Hil. 8 W. 3.

2. It appears from another Report of this Caſe, that one Queſtion was, whether the Baptiſm of the Negro after the Converſion did not amount to an Emancipation, and conſequently take away the Plaintiff's Right of Action: But the Court determined the Caſe upon the general Queſtion, without giving an Opinion as to this Queſtion. Carth. 397.

3. In a ſtill later Caſe it was holden, that a Man cannot have ſuch a Property in a Negro in *England*, as will enable him to maintain an Action of Trover for the Converſion of the Negro. Ld. Raym. 1274. Smith *v.* Gould. Paſch. 5 Ann.

4. If the Sheep of *J. N.* are mixed with the Sheep of *J. S.* and the latter, in order to ſeparate his Sheep from thoſe of *J. N.* chaſe the Sheep of *J. N.* to the next Place proper for ſeparating them, an Action of Trover does not lie: Becauſe, as the Sheep of *J. S.* cannot be eaſily ſeparated from the Sheep of *J. N.* without ſuch chaſing of the Sheep of *J. N.* the Chaſing of them is lawful. Bro. Treſp. pl. 213.

5. An Action of Trover lies for the Converſion of a Dog; for, a Dog being a tame Animal, Property may as well be in a Dog as in any other tame Animal. Fitz. N. B. 86. Bro. Treſp. pl. 407. Hob. 283. Cro. Eliz. 125. Cro. Ja. 463.

6. If *J. S.* be chaſing the Beaſt of *J. N.* with a little Dog, in order to chaſe it out of Land in his Poſſeſſion, and *J. N.* kill the Dog, an Action of Trover lies; becauſe, as *J. S.* had an Election to chaſe the Beaſt out of his Land, or to diſtrain it Damage-feaſant, the Chaſing with ſuch a Dog is lawful. 1 Freem. 347. King *v.* Roſe, 4 Rep. 38. Cro. Car. 254.

7. But if *J. S.* be chaſing the Beaſt of *J. N.* with a Maſtiff Dog, in order to drive it out of Land in his Poſſeſſion, and *J. N.* kill the Dog, this Action does not lie; becauſe the Chaſing with ſuch a Dog is not lawful. 1 Freem. 347. King *v.* Roſe.

8. If the Dog of *J. N.* which is found in the Warren of *J. S.* be killed by *J. S.* this Action does not lie; the Killing of ſuch Dog by the Owner of the Warren being lawful. Cro. Ja. 45. 1 Sid. 336.

9. It is in the general true, that an Action of Trover does not lie for the Converſion of a Beaſt or Bird *Feræ Naturæ*: Becauſe there is not in the general any Property in ſuch Beaſt or Bird. Bro. Detin. pl. 44. Dyer 306. Cro. Car. 19, 545

10. But

Bro. Detin. pl. 44. 10. But if a Beaſt or Bird *Feræ Naturæ* have been reclaimed, this Action does lie for the Converſion thereof; becauſe there is a Property in ſuch Beaſt or Bird.

11. And an Action of Trover does ſometimes lie for the Converſion of a Beaſt or Bird *Feræ Naturæ*, although the Beaſt or Bird have not been reclaimed.

Fitz. N. B. 87. Godb. 123. Salk. 556. 11 Mod. 75. 12. If a Hare be killed by *J. N.* upon the Land of *J. S.* an Action of Trover lies, although it have not been reclaimed; inaſmuch as *J. S.* has by Reaſon of its being upon his Land a local Property in the Hare.

5 Rep. 104. Boulton's Caſe. Cro. Car. 554. 13. If a Hare, which was found upon the Land of *J. S.* be driven from thence, and afterwards killed by *J. N.* an Action of Trover does not in the general lie; for the Property of *J. S.* which is only local, may be, and uſually is, determined by driving the Hare of his Land.

Godb. 123. Salk. 556. 11 Mod. 75. 14. But if *J. S.* do immediately purſue the Hare, which has been driven off his Land and killed by *J. N.* this Action lies; for by the immediate Purſuit the local Property is continued.

Cro. Ja. 262. Grimes *v.* Shack. 15. An Action of Trover lies for the Converſion of a Beaſt or Bird, which is valuable on Account of its being Merchandize, as a Monkey or a Parrot; although the Beaſt or Bird be *Feræ Naturæ*, and have not been reclaimed.

Hardr. 111. Jones *v.* Winkworth. 16. An Action of Trover does not lie for the Converſion of a Record; becauſe a Record is not private Property: But this Action lies for the Converſion of a Copy of a Record; the Copy of a Record being private Property.

Cro. Eliz. 661. Holiday *v.* Hicks. 17. It is in one Caſe ſaid, that an Action of Trover does not lie for Money, unleſs it were in a Bag at the Time of the Converſion.

1 Roll. Abr. 5. K. pl. 5. Cro. Eliz. 841. Cro. Car. 89. 18. But it is in other Caſes laid down, that, as the Deſign of this Action is not to recover a Thing *in Specie*, but to recover Damages for the Converſion thereof, it does lies for Money, although it were not in a Bag at the Time of the Converſion.

Cro. Eliz. 870. Ledeſham *v.* Lubram. 19. An Action of Trover lies for the Converſion of Money depoſited as a Wager.

1 Sid. 122. Rey *v.* Stephens. 20. If a Feme-Covert loſe the Money of her Huſband at Play, an Action of Trover lies.

Cro. Ja 144. Ratcliff *v.* Davis. 21. If Goods pledged are not delivered, upon Payment or Tender of the Money for which they were pledged, an Action of Trover lies.

1 Barnard, 431. Adams *v.* Hutton. 22. In an Action of Trover for Barley it appeared, that the Barley was delivered to the Defendant to be made into Malt. It was ruled, that the Action did not lie, becauſe the Barley was delivered to be made into Malt; but that, in Caſe there had been a Payment or Tender of the Money due for making the Barley into Malt, an Action of Trover would have lain for the Malt.

MS. Rep. Saunders *v.* Vincent, Eaſt, 31 G. 2. in B. R. 23. In an Action of Trover, brought by a Widow againſt the Vendee of Goods ſold by her Son, it appeared in Evidence, that the Plaintiff had ſixteen Years before let her Son into the Poſſeſſion of a Farm at that Time holden by her, together with the Goods in Queſtion, which were at that Time Part of the Stock of the Farm; and that the Son had ever ſince occupied the Farm, and acted as Owner of the Goods. A Verdict being found for the Defendant upon this Evidence, it was upon a Motion for a new Trial ſaid, that as a Transfer of the Property in the Goods from the Mother to the

the Son was not expreſsly proved, the Verdict ought to have been for the Plaintiff. A new Trial was refuſed: And by the Court—As the Son had been ſo long in the Poſſeſſion of the Goods, it ought to be preſumed the Property was in him. It would moreover be extremely hard, if a Purchaſer for a valuable Conſideration ſhould loſe his Money by the ſetting up of Property in the Mother, after the Property had ſo long been to all Appearance in the Son.

24. If a Sheriff's Officer, having a Writ of *Fieri Facias* to take the Goods of *J. N.* take the Goods of *J. S.* an Action of Trover lies. Bro. Treſp. pl. 364. 2 Roll. Abr. 352. O. pl. 3. pl. 9. Carth. 381.

25. An Action of Trover does not lie for taking the Goods of *J. S.* which a Sheriffs Officer has taken under a Writ of Replevin upon a Preſumption that they were the Goods of *J. N.* becauſe this Writ is different from a Writ of *Fieri Facias*. By the former the Officer is empowered to take certain Goods therein ſpecified; by the latter he is only empowered to take the Goods of a certain Perſon. But if *J. S.* did claim a Property in the Goods at the Time of taking them, and the Officer did afterwards carry them away, without having the Property determined under a Writ *de proprietate probanda*, this Action does lie. Carth. 381. Hallet *v.* Burt.

26. It was ruled by *Holt* Ch. J. that if a Sheriff, who is impowered by an Extent to ſeize the Goods of *J. N.* ſeize the Goods of *J. S.* an Action of Trover does not lie; becauſe by the Seizure the Property in the Goods is veſted in the Crown. Ld. Raym. 736. Rex *v.* Woodward.

27. If ſeized Goods are condemned by a Court having Juriſdiction in the Matter, an Action of Trover does not lie; the Property in the Goods being by the Condemnation veſted in the Crown. Ld. Raym. 336. Ekins *v.* Smith.

28. It is in one Caſe laid down, that if ſeized Goods are lodged in the Cuſtom-houſe an Action of Trover does not lie, although there be afterwards a Verdict for the Claimer of the Goods. Bunb. 67. Etricke's Caſe.

29. But it is laid down in another Caſe, that the Owner of the Goods may in ſuch Caſe maintain an Action of Treſpaſs, or an Action upon the Caſe. Bunb. 80. Iſrael's Caſe.

30. It is laid down that if *J. S.* take Goods of *J. N.* in order to prevent their being ſtolen or damaged, an Action of Trover lies; becauſe the Loſs would not, if either of theſe Things had happened, have been irreparable. But if *J. S.* take Goods of *J. N.* which are in Danger of being deſtroyed by Fire or otherwiſe, in order to preſerve them, this Action does not lie, becauſe the Loſs would in ſuch Caſe have been irreparable. Bro. Treſp. pl. 213.

31. An Action of Trover does not lie for the Converſion of Goods, for which an Appeal of Robbery has been brought; becauſe a Perſon, who has by bringing the Appeal affirmed the Taking to have been felonious, ſhall not afterwards be received to ſay that it was only a Converſion. 1 Jon. 148. 150. Markham *v.* Cobb. Latch 144. S. C.

32. It has been holden in one Caſe, that if *J. S.* have been convicted or attainted of taking the Goods of *J. N.* felonioufly, *J. N.* cannot, provided he did himſelf give Evidence or procure any Perſon to give Evidence againſt *J. S.* maintain an Action of Trover; becauſe he is in either Caſe intitled under the 21 *H.* 8. *c.* 11. to Reſtitution of the Goods. 1 Jon. 147. 150. Markham *v.* Cobb. Paſch. 1 Car. 1. Latch 144. S. C. Noy 82. S. C.

33. It is laid down in a ſubſequent Caſe, that an Action of Trover does lie in ſuch Caſe; for that, as the Party robbed has done his Duty to the Publick in proſecuting the Thief, he ought not to be deprived of the Remedy by an Action of Trover for the Injury to himſelf. 2 Roll. Abr. 557 Y pl. 24. Dawkes *v.* Cavenah. Mich. 1652.

34. The

34. The Reaſon given in the latter Caſe is by no Means concluſive; for what Purpoſe would it anſwer, that a Perſon robbed ſhould be at Liberty to bring an Action of Trover, when he has a ſpeedier Remedy under the Statute.

Bro. Treſp. pl. 415. 35. It is ſaid in one Book, that an Action of Trover does not lie, after the Perſon who took the Goods has been indicted of Felony and acquitted; for that, as *omne Majus trahit ad ſe Minus*, the Converſion is merged in the Felony.

1 Jon. 150. Markham *v.* Cobb. Latch 144. Noy 82. Sty. 346. 36. But in other Books it is laid down, that if *J. S.* have been acquitted upon an Indictment for felonioufly taking the Goods of *J. N.* an Action of Trover lies; becauſe, as the taking does not in this Caſe appear to have been felonious, it is reaſonable, that *J. N.* ſhould recover Damages for the Converſion of his Goods.

1 Leon 223. Vandrink *v.* Archer. 37. An Action of Trover does not lie for the Converſion of Goods bought in Market Overt, although they were ſtolen; for by the Sale in Market Overt the Property in the Goods was veſted in the Vendee.

MS. Rep. Miller *v.* Race, Hil. 31 G. 2. in B. R. 38. *A.* who came to the Poſſeſſion of a Bank Note the Property of *B.* by robbing the Mail, parted with it to *C.* for a valuable Conſideration. Payment of the Note being afterwards refuſed at the Bank, *C.* brought an Action of Trover againſt the Caſhier of the Bank who had ſigned it. Upon a Caſe reſerved it was holden, that the Action was maintainable: And by Lord *Mansfield* Ch. J. if a Man did not in every Caſe acquire a Property in a Bank Note by giving a valuable Conſideration for it, an End would ſoon be put to the Circulation of Bank Notes.

2 Roll. Abr. 5 L. pl. 1. 1 Leon. 223. 6 Mod. 212. 39. An Action of Trover lies, although the Goods converted be afterwards reſtored to the Owner; for the Reſtoration does only go in Mitigation of Damages.

(E) Againſt whom an Action of Trover may be brought.

Bro. Treſp. pl. 92. 1. IF *J. S.* take away a Beaſt, which he had bailed to *J. N.* for a Time certain, before the Expiration of the Time, he is not liable to an Action of Trover; for the Perſon, who has only a ſpecial Property in a perſonal Chattel, can never maintain this Action againſt the Perſon in whom the general Property is; the Remedy of the Bailee being an Action upon the Caſe.

Bro. Treſp. pl. 295. 5 Rep. 14. Cro. Eliz. 784. 2. If *J. S.* kill the Beaſt of *J. N.* which was bailed to him generally, an Action of Trover does not lie againſt *J. S.* for by the Bailment a general Confidence was placed in him; and the Remedy for an Abuſe of ſuch Confidence is an Action upon the Caſe.

1 Inſt. 57. Bro. Treſp. pl. 295. 5 Rep 13. Cro. Eliz. 780. 3. But if *J. S.* kill the Beaſt of *J. N.* which was bailed to him for a particular Purpoſe, as to plough his Land, he is liable to this Action; becauſe a general Confidence was not placed in him by the Bailment.

1 Leon. 87. Gloſſe *v.* Hayman. 4. If a Servant, who was truſted to ſell the Goods of his Maſter, carry them away, an Action of Trover lies againſt him; in as much as, the Confidence placed in him extended only to ſelling the Goods.

5. If

5. If a Servant, who has by the Command of his Maſter lawfully diſtrained a Horſe, uſe it, the Servant is liable to an Action of Trover; becauſe the Command did not extend to the uſing of the Horſe. Bro. Treſp. pl. 211.

6. *A.* pawned Goods to *B.* who was known to be a Servant employed by *C.* a Pawnbroker in the way of his Trade. *A.* afterwards tendered to *B.* the Money due upon the Goods, and demanded the Goods. *B.* did not deliver them, but ſaid they were ſold. It was ruled by *Holt* Ch. J. that an Action of Trover lay againſt *C.* Ld. Raym. 738. Jones v. Hart. Salk. 441.

7. It is laid down in one Caſe, that an Action of Trover does not lie againſt a Servant, for an unlawful Intermeddling with the Goods of any Perſon by the Command of his Maſter, unleſs the Intermeddling be ſuch as amounts to a Treſpaſs; becauſe the Maſter is in ſuch Caſe anſwerable. It is moreover ſaid, that it would be very inconvenient, if it ſhould be always neceſſary for a Servant to be ſatisfied of his Maſter's Right to Goods, before he obeys his Command as to the Intermeddling therewith. 2 Mod. 244. Mires v. Solebay.

8. But it is laid down in another Caſe, that if a Servant do unlawfully intermeddle with the Goods of any Perſon, the Servant, although it be by the Command of his Maſter, is liable to an Action of Trover; for that the Command of a Maſter does neither juſtify nor excuſe his Servant in doing a tortious Act. Sayer 41. Perkins Aſſignee of Hughes v. Smith.

9. It is ſaid to have been holden, that if a Sheriff, who has ſeiſed Goods under a Writ of *Fieri Facias*, do after he is out of his Office ſell them, he is liable to an Action of Trover. Yelv. 44. Ayer v. Aden.

10. But from two other Reports of the ſame Caſe it appears to have been holden, that this Action would not lie in ſuch Caſe againſt the Sheriff. Moor 757. Cro. Ja. 53.

11. And in another Book, wherein the Caſe is cited, it is ſaid, that *Yelverton* is miſtaken in his Report; for that upon examining the Roll it appeared to have been determined as it is reported by *Moor* and *Croke*. 2 Saund. 47. Wilbraham v. Snow.

12. It has been holden, that an Action of Trover lies againſt a Sheriff for ſelling, after an Aſſignment by the Commiſſioners, the Goods of a Bankrupt, which had been ſeiſed by him under a Writ of *Fieri Facias* after the Act of Bankruptcy: And by *Ld. Mansfield* Ch. J.—The Sheriff was not liable to this Action for Seiſing the Goods, in as much as he might be ignorant of the Act of Bankruptcy; but the Sale of them after the Aſſignment by the Commiſſioners, of which he was bound to take Notice, was a Converſion. MS. Rep. Cooper v. Chitty, Mich. 30 G. 2. in B. R.

13. *J. S.* the Plaintiff in an Action againſt *J. N.* had received of a Sheriff the Money, for which the Goods of *J. N.* ſeiſed under a Writ of *Fieri Facias* after he had committed an Act of Bankruptcy, had been ſold. It was holden, that an Action of Trover lay againſt *J. S.* without making the Sheriff a Defendant. Str. 996. Ruſh Aſſignee of Ryland v. Baker.

14. If a Stranger have officiouſly aſſiſted a Sheriff or his Officer in the Execution of a Writ of *Fieri Facias*, which iſſued upon a regular Judgment, he is not liable to an Action of Trover; for it is not only lawful, but it is the Duty of every Man to aſſiſt in the Execution of ſuch Writ. 10 Mod. 24. Templeman's Caſe.

15. An Action of Trover does not lie againſt a Sheriff or his Officer, or againſt any Perſon, who by the Command of either of theſe did aſſiſt in the Execution of a Writ of *Fieri Facias*, although there were no Judgment to warrant the iſſuing of the Writ; for neither of theſe has done more than obey the Writ, which it was the Duty of every one of them to do. 12 Mod. 178. Britton v. Cole. 2 Jon. 114.

16. But if a Stranger have officiouſly aſſiſted a Sheriff or his Officer in the Execution of ſuch Writ, he is liable to this Action; for, as he acted officiouſly, it was incumbent upon him to take Care, that there was a Judgment to warrant the iſſuing of the Writ. 12 Mod. 179. Britton v. Cole. Carth. 445.

17. An.

Str. 509. Philips v. Biron. Raym. 73.

17. An Action of Trover does not lie againſt a Sheriff or his Officer, or againſt any Perſon, who by the Command of either of theſe did aſſiſt in the Execution of a Writ of *Fieri Facias*, although the Judgment upon which the Writ iſſued were irregular; becauſe the Fault in ſuch Caſe is in the Court or ſome Officer of the Court.

Str. 509. Philips v. Biron. Raym. 73.

18. But if a Stranger have officiouſly aſſiſted a Sheriff or his Officer in the Execution of ſuch Writ, he is liable to this Action: For, as he acted officiouſly, it was incumbent upon him to take Care, that the Judgment was regular.

Salk. 283. Ford v. Hopkins.

19. It appeared in Evidence, that the Plaintiff had left ſome Lottery Tickets with a Goldſmith, in order to receive the Money due upon them for the Uſe of the Plaintiff; that a certain Number of Tickets in the ſame Lottery had been left by the Defendant with the Goldſmith, who gave the Defendant a Note to deliver the ſame Number of Tickets to him; and that the Goldſmith did afterwards deliver as many of the Plaintiff's Tickets to the Defendant as were mentioned in the Note. It was holden, that an Action of Trover lay againſt the Defendant for the Converſion of theſe Tickets. And by the Court—The Lottery Tickets being left with the Goldſmith for the ſpecial Purpoſe of receiving the Money thereupon due for the Plaintiff's Uſe, he had no Power to diſpoſe of them; and conſequently, as the Property was not changed by the Delivery of the Tickets to the Defendant, he is liable to this Action.

Str. 1187. Hartop. v. Hoare.

20. In a ſpecial Verdict it was ſtated, that *J. S.* the Owner of Jewels, had bailed them ſealed up in a Bag to a Banker for ſafe Cuſtody only; that the Banker broke open the Seal, took the Jewels out of the Bag, and pawned them to *J. N.* for three hundred Pounds. It was holden that an Action of Trover lay againſt *J. N.* for the Converſion of the Jewels. And by the Court—The Plaintiff's Jewels being delivered to the Banker for ſafe Cuſtody only, his breaking open the Bag and taking them out was a Treſpaſs; and conſequently the Defendant, although he came honeſtly to the Poſſeſſion of the Jewels, is liable to this Action: Becauſe they were delivered to him by a Perſon who had no Property in them.

Str. 813. Parker v. Godin.

21. The Wife of a Bankrupt delivered ſome Plate, left with her by her Huſband at the Time of his abſconding, to a Servant, that he might borrow Money thereupon. The Servant went with the Plate to the Door of a Banker's Shop, and there delivered it to the Defendant, who went into the Shop and pawned it in his own Name, and immediately went back to the Wife and delivered the Money to her. It was holden, that, as neither the Wife nor the Servant had a Power of diſpoſing of the Plate, this was a Converſion in the Defendant, for which he was liable to anſwer to the Aſſignees of the Huſband.

Bro. Treſp. pl. 256. pl. 329. pl. 359.

22. It is laid down, that if *A.* take the Goods of *B.* illegally, and *C.* do afterwards take them illegally from *A.* *B.* cannot maintain an Action of Trover againſt *C.* For that by the firſt Taking, notwithſtanding it was a tortious one, the Property of *B.* was diveſted.

1 Sid. 438.

23. But it is ſaid in one Book, that *A.* does not in ſuch Caſe acquire any Property in the Goods by the firſt Taking, and conſequently, that *B.* may maintain an Action of Trover againſt *C.*

Cro. Eliz. 638. Holiday v. Hickes.

24. If a Factor who has ſold the Corn of *J. S.* and received the Money for it, refuſe to pay the Money to *J. S.* an Action of Trover lies againſt him.

Salk. 289. Anon. Cro. Eliz. 638.

25. A Servant, who had a general Authority to receive and pay Money for his Maſter, after receiving ſome Money due to his Maſter from *J. N.* gave it to *J. S.* and delivered it to him. It was ruled that an Action of Trover lay for the Maſter againſt *J. S.* and by *Holt* Ch. J.

as

as the Receipt of the Servant was a Diſcharge to *J. N.* the Money was received to the Uſe of the Maſter; and conſequently the Poſſeſſion of the Servant muſt be intended to have been the Poſſeſſion of the Maſter.

26. If a Carrier, to whom Goods have been delivered to be carried, be robbed of the Goods, or loſe them through Negligence, he is liable to an Action upon the Caſe; but an Action of Trover does not lie againſt him; becauſe he has not in either Caſe been guilty of a Mal-feaſance. 1 Roll. Abr. 2. pl. 1. pl. 2. pl. 3. Hob. 17. Cro. Ja. 330. Salk. 143. 12 Mod. 482.

27. But if a Carrier, to whom Goods have been delivered to be carried, ſell the Goods, or refuſe to deliver them upon the Money due for Carriage being paid or tendered, an Action of Trover lies againſt him. Salk. 655. Anon.

28. It is ſaid to have been ruled by *Holt* Ch. J. that if the Goods delivered to be carried were not delivered to the Carrier himſelf, but to his Book-keeper, an Action of Trover does not lie againſt the Carrier, unleſs the Goods be afterwards converted by him. Ld. Raym. 792. Anon. Trin. 1 Ann.

29. But the contrary was ruled in a ſubſequent Caſe. In an Action of Trover againſt a Book-keeper it appeared, that Goods were delivered to him to be carried by his Maſter's Waggon. It was holden that the Carrier himſelf is in ſuch Caſe liable to anſwer for the Converſion of the Goods. 2 Barnard. 234. Harvey v. Syliard, Hil. 6 G. 2.

30. And the latter Caſe agrees with what is laid down in another Caſe. In an Action of Trover againſt a Maſter of a Hackney Coach it appeared, that the Goods were delivered to his Servant who drove the Coach; and the Queſtion was if the Maſter was anſwerable for the Converſion of them. It was ruled that he was not; and by *Holt* Ch. J. It would be hard if the Maſter of a Hackney Coach, who is not paid for the Carriage of Goods, ſhould be anſwerable for the Converſion of them. There is a wide Difference betwixt the Caſe of a Hackney Coach and that of a Stage Coach. If a Paſſenger in a Stage Coach, who is allowed to carry Goods of a certain Weight, deliver Goods not exceeding that Weight to the Driver of the Coach, the Maſter of the Coach is anſwerable for them; becauſe the Money he receives is paid for the Carriage of the Goods as well as of the Paſſenger. It has been holden, even in the Caſe of a Stage Coach, that if a Paſſenger carry Goods of a greater Weight than he is allowed to carry, the Maſter of the Coach is not anſwerable for the over Weight, unleſs it be paid for. Skin. 625. Middleton v. Forder.

31. An Action of Trover does not lie againſt a Carrier for refuſing to deliver Goods, unleſs the Money due for the Carriage have been paid or tendered; becauſe, as a Carrier is by Law bound to carry the Goods delivered to him, it is highly reaſonable, that he ſhould have a Right to detain them, until the Money due for the Carriage is paid or tendered. Salk. 654. Hartford v. Jones.

32. An Action of Trover does not lie againſt an Inn-keeper for detaining the Horſe of his Gueſt, unleſs the Money due for keeping the Horſe have been paid or tendered: For, as an Innkeeper is by Law bound to receive the Horſe of a Traveller, in Caſe his Stable be not full, it is very reaſonable, that he ſhould be paid for Keeping the Horſe before it is taken away. 2 Show. 161, 179. Ld. Raym. 868.

33. It was holden by three Judges contrary to the Opinion of *Holt* Ch. J. that an Inn-keeper may detain a Horſe, although the Man who put the Horſe into the Stable have not lodged in his Houſe; for that the putting up of his Horſe, from which the Inn-keeper has a Profit, makes the Man a Gueſt. Ld. Raym. 868. York v. Greenaugh.

34. If a ſtolen Horſe be put up at an Inn, an Action of Trover does not lie againſt the Innkeeper for detaining the Horſe from the Owner, unleſs the Money due for Keeping the Horſe have been paid or tendered; Ld. Raym. 867. York v. Greenaugh.

becauſe the Innkeeper was bound to receive the Horſe, and it was impoſſible for him to know, whether his Gueſt came honeſtly by it.

Yelv. 67. 35. An Action of Trover does not lie againſt a Farrier, for refuſing to deliver a Horſe which has been Shod by him, unleſs the Money due for the Shoeing have been paid or tendered.

Hob. 42. Cooper v. Andrews. 36. A Taylor is not liable to an Action of Trover, for refuſing to deliver a Coat made by him to the Perſon from whom he received the Materials for it, unleſs the Money due for making the Coat have been paid or tendered.

MS. Rep. Cauſer v. Wilcox. 37. It was decreed by *Strange* Maſter of the Rolls, that a Factor, who had paid Money for inſuring the Goods of his Principal, and had been at other Expence concerning them, had ſuch a Lien upon the Goods, that a Court of Equity would not oblige him to deliver them, before the Money due was paid or tendered. The Factor, not being ſatisfied with this Decree, appealed to the Chancellor; and the Appeal came on before Lord *Hardwicke* in *February* 1755. His Lordſhip, after taking Time to conſider, and ſending for ſome Merchants to inform himſelf of the Nature of a Factor's Buſineſs, decreed, that a Factor has a Lien upon the Goods of his Principal, ſo long as the Goods continue in his Poſſeſſion, not only for what is due for his Trouble and Expence concerning them, but alſo for all Money due to him from his Principal.

MS Rep. Gardiner v. Coleman. 38. Another Decree to the ſame Effect was pronounced by Lord *Hardwicke* a few Months after.

Ld. Raym. 393. Hartford v. Jones. 39. An Action of Trover does not lie againſt the Saver of Goods thrown on Shore, which were Part of the Cargo of a Ship that had been wrecked, unleſs a Satisfaction have been made or tendered for the Trouble or Expence of ſaving them; it being highly reaſonable, that the Party who has ſaved Goods, and has perhaps done it at the Peril of his Life, ſhould have a Lien upon the Goods for his Trouble or Expence.

2 Roll. Abr. 92. Taylor v. James. 40. The Lord of a Manor, who had ſeized a Beaſt as an Eſtray, was at the Expence of keeping it ſome Time after he had proclaimed it. Within a Year and Day after the Proclamation the Owner of the Beaſt came and demanded it; but did not make or tender any Satisfaction for the Keeping. Upon the Refuſal of the Lord to deliver the Beaſt, an Action of Trover was brought againſt him. It was holden, that, as the Owner of the Beaſt had not made or tendered a Satisfaction for the Keeping, the Action did not lie.

Ld. Raym. 738. Anon. 41. It was ruled by *Holt* Ch. J. that if an Attorney, who has been employed to draw and attend the Execution of a Deed, do not deliver it upon demand, an Action of Trover lies againſt him; for that, as he may bring an Action for the Money due for drawing and attending the Execution of the Deed, he cannot detain it, although the Money have neither been paid nor tendered.

Str. 651. Stone v. Lingwood. 42. The Plaintiff, who was Maſter of a Ship, had brought Home a ſmall Parcel of Elephants Teeth on his own Account, and a large Parcel upon the Account of the Defendant, who was the Owner of the Ship. The Defendant entered both Parcels at the Cuſtom-Houſe, paid the Duty for both, and both were delivered to him. Upon his refuſing to deliver to the Plaintiff his Parcel an Action of Trover was brought; and the Queſtion was, whether as the Plaintiff had neither paid nor tendered his Part of the Duty the Action could be maintained. It was ruled that it could; and by *Eyre* Ch. J. the Defendant had no Right to detain the Plaintiff's Parcel, notwithſtanding the Money paid by him as Duty for it was neither paid nor tendered; for he might have brought an Action for the Money, or he may now give Evidence of the Money paid, and then it may be deducted out of the Plaintiff's Damages. The Reporter adds, that the latter was done.

43. A

43. A Carpenter, after working ſome Time in one of the Queen's Yards, refuſed to work any longer. Hereupon the Surveyor of the Yard refuſed to let him take away his Tools. An Action of Trover being brought againſt the Surveyor, he gave in Evidence an Uſage for the Surveyors of the Queen's Yards to detain the Tools of Workmen, in order to compel them to continue working in the Yards until the Queen's Work is finiſhed. It was holden that the Action lay; and no Regard was paid by *Holt* Ch. J. before whom the Cauſe was tried, to the Uſage. 6 Mod. 212. Baldwin v. Cole.

44. If a Perſon, who would otherwiſe have a Right to detain the Perſonal Chattel of another, for the Trouble or Expence he has been at concerning it, contract to be paid a Sum certain for the Trouble or Expence, he does thereby wave the Right of detaining the Chattel. 2 Roll. Abr. 92. M. pl. 2. pl. 6. Cro. Car. 271. Yelv. 66.

45. An Agreement was entered into, whereby ten Shillings and Sixpence was to be paid to a Farrier for curing a Mare; and a reaſonable Sum for keeping the Mare until ſhe ſhould be cured. The Owner of the Mare, as ſoon as ſhe was cured, tendered ten Shillings and Sixpence, and demanded the Mare. The Farrier refuſed to deliver the Mare, unleſs a groſs Sum was paid for the Cure and keeping of the Mare, and an Action of Trover was brought. It was holden, that the Action lay: And by *Ryder* Ch. J.—As ten Shillings and Sixpence were tendered, the Defendant had no Right to detain the Mare on Account of the Cure. It is not neceſſary to give any Opinion, as to the Right of a Farrier to detain a Beaſt for the Money due for keeping it until it is cured; becauſe, if a Farrier have in the general ſuch Right, it was in the preſent Caſe waved by the ſpecial Agreement to be paid a reaſonable Sum for the keeping. Sayer 224. Brenen v. Currint.

(F) Of the Pleadings in an Action of Trover.

1. Of the Declaration.

1. IN an Action of Trover for the Converſion of Letters Patent, there was a Verdict for the Plaintiff. Upon a Motion in Arreſt of Judgment it was objected, that the Plaintiff had not alledged in his Declaration, that he was poſſeſſed of the Letters Patent as of his own proper Goods. Judgment was given for the Plaintiff: And by the Court—The Plaintiff has alledged, that the Defendant knowing the Letters Patent to appertain to him did convert them, which implies that they were the Property of the Plaintiff. Hardr. 111. Jones v. Winkworth.

2. The Reporter does indeed add, that the Objection was not allowed to be good; becauſe it was after a Verdict. But it is not to be conceived, that the Verdict could in ſuch Caſe make a Difference; for, if a Property in the Plaintiff had not been either expreſsly or impliedly alledged, the Declaration would have been defective in a Matter of Subſtance, and conſequently the Defect would not have been cured by a Verdict.

3. But if the Action be in the Court of *Common Pleas*, it is not neceſſary to alledge in the Count, that the Goods were the Property of the Plaintiff, provided this be alledged in the Writ; becauſe the Writ is in that Court Parcel of the Declaration. 1 Sid. 187. Jones v. Pritchard. Lutw. 1510.

4. It is not neceſſary for the Plaintiff in an Action of Trover to ſhew in his Declaration, in what Manner his Property in the Goods was acquired. 2 Bulſtr. 288. Willamore v. Barford.

2 Saund. 379. Pinkney's Caſe.

5. If it appear in the Declaration in an Action of Trover, that ſome of the Goods were the Property of the Plaintiff at the Time of the Converſion, but this do not appear as to ſome other of the Goods; and Judgment be entered up generally, the Judgment is erroneous: But if the Plaintiff, although the Verdict be general, enter a *Remittitur* as to the Goods which do not appear to be his Property, and enter up Judgment as to the Reſidue, the Judgment is good.

Cro. Eliz. 781. Gumbleton *v.* Grafton.

6. The Plaintiff in an Action of Trover alledged in his Declaration, that he delivered the Goods charged to have been converted to the Defendant to be kept for him. It was objected, that the Declaration was bad, becauſe the Plaintiff had not alledged a Loſs of the Goods: But it was holden to be good.

5 Rep. 34. Playter's Caſe. 2 Inſt. 435. Cro. Eliz. 817. 1 Ventr. 53. Salk. 628. Ld. Raym. 588, 1410. Str. 637.

7. The perſonal Chattel, for the Converſion of which an Action of Trover is brought, muſt be deſcribed in the Declaration with a Degree of Certainty: For if this be not done, the Defendant would not know how to prepare for his Defence; nor would he be able, in Caſe a ſecond Action ſhould be brought for the Converſion of the ſame Chattel, to plead a Recovery in the former Action.

Cro. Eliz. 817. Wood *v.* Smith. 12 Mod. 3. Ld. Raym. 518, 1410.

8. But a leſſer Degree of Certainty, in deſcribing the perſonal Chattel, is ſufficient in the Declaration in an Action of Trover after a Verdict than upon a Demurrer; inaſmuch as the Court will after a Verdict intend, that ſome Defect of Certainty in the Declaration was ſupplied by Evidence.

9. In order to form a Judgment of the Degree of Certainty neceſſary, in deſcribing the perſonal Chattel for the Converſion of which an Action of Trover is brought, it will be proper to mention the principal Caſes upon the Point; which ſhall be ranged in Order of Time as they were determined.

5 Rep. 34. Playter's Caſe. Mich. 35 Eliz.

10. The Declaration in an Action of Trover, which charged the Converſion of ſome Fiſh, without ſhewing the Number or Quality of the Fiſh, was after a Verdict holden to be too incertain.

Cro. Eliz. 866. Gramvel *v.* Robotham. Mich. 43 Eliz.

11. The Declaration in an Action of Trover, which charged the Converſion of a Parcel of Fiſh called Ling, was upon a Writ of Error holden to be bad, becauſe the Quantity of the Fiſh was not ſhewn.

2 Show. 433. Hawes *v.* Randal. Eaſt. 1 Ja. 1.

12. The Declaration in an Action of Trover, which charged the Converſion of ſeven Pieces of Linen Cloth, was holden to be bad, for want of ſhewing the Number of Yards the Pieces contained; for that the Quantity of Linen Cloth contained in a Piece is altogether uncertain.

Cro. Ja. 664. Bancroft *v.* Coe, Hil. 19 Ja. 1.

13. In the Declaration in an Action of Trover the Converſion *uni Riſci*, Anglice *a Trunk full of Linen*, was charged, and there was a Verdict for the Plaintiff with twenty Pounds Damages. Upon a Motion in Arreſt of Judgment *Haughton* J. was of Opinion that the Declaration was not certain enough: But *Lee* Ch. J. *Dodderidge* J. and *Chamberlain* J. were of Opinion that it was; for that they would intend the Damages to have been given for the Trunk alone, and the Plaintiff had Judgment. A Writ of Error being brought, the Judgment was affirmed.

Mar. 60. Hodges *v.* Simpſon. Mich. 15 Car. 1.

14. The Declaration in an Action of Trover, which charged the Converſion of two Sheaves of Corn, was holden to be bad; becauſe the Species of the Corn was not ſhewn.

Sty. 25. Anon. Paſch. 23 Car. 1.

15. The Declaration in an Action of Trover, which charged the Converſion of a Library of Books, was holden to be certain enough; although neither the Number nor Quality of the Books was ſhewn.

16. The

16. The Declaration in an Action of Trover which charged the Conversion *ſex Parcellarum plumbi cinereri*, Anglice *Pewter Porrengers*, was holden to be certain enough. Sty. 199. Graves *v.* Drake, Hil. 1 Car. 2.

17. In an Action of Trover the Declaration, which charged the Conversion of three Ricks of Hay, was after a Verdict holden to be certain enough; notwithſtanding the Quantity of the Hay was not ſhewn. 1 Lev. 301. Weſt *v.* Davis. Mich. 22 Car. 2.

18. The Plaintiff in an Action of *Aſſumpſit* declared upon a *Quantum Meruit* for a Parcel of Thread. The Declaration was upon a Writ of Error holden to be good. And by the Court—This Manner of declaring would not be certain enough in an Action wherein a Thing is to be recovered in Specie: But it is ſo in this Action, or in an Action of Trover, becauſe only Damages are to be recovered in theſe Actions. 1 Lev. 303. Jenny *v.* Norris, Mich. 22 Car. 2.

19. The Declaration in an Action of Trover, which charged the Converſion of a Ship, with Guns and Sails thereto belonging, was holden to be certain enough, although neither the Number nor Quality of the Guns and Sails was ſhewn; becauſe theſe are to be conſidered as appertaining to the Ship. Ld. Raym. 588. The Caſe of Boroughs *v.* Hale there cited. Trin. 23 Car. 2.

20. The Declaration in an Action of Trover, which charged the Converſion of divers Glaſs Bottles, was after a Verdict holden to be bad; becauſe it did not ſhew the Number of Bottles. 2 Lev. 176. Hicks *v.* Pendarvis, Mich. 28 Car. 2.

21. The Declaration in an Action of Trover, which charged the Converſion of a Parcel of Woollen Yarn, was upon a Motion in Arreſt of Judgment holden to be too uncertain. 2 Lev. 195. Wade *v.* Hatcher, Trin. 29 Car. 2.

22. The Declaration in an Action of Trover, which charged the Converſion of twenty Bullocks and Heifers, was upon a Writ of Error holden to be bad; becauſe it did not ſhew how many Beaſts there were of each Kind. 1 Ventr. 317. Davis *v.* Price, Mich. 29 Car. 2.

23. The Declaration in an Action of Trover, after deſcribing divers Utenſils therein charged to have been converted with ſufficient Certainty, contained theſe Words *cum aliis Utenſilibus*. The Declaration was holden to be bad; for want of ſhewing how many, and of what Kind, the Utenſils comprehended under the Words *aliis Utenſilibus* were. 3 Lev. 18. Blackhouſe *v.* Moor. Paſch. 33 Car. 2.

24. The Declaration in an Action of Trover, which charged the Converſion of ten Weights, was after a Verdict holden to be certain enough; although it did not ſhew the Quantity of the Weights. 12 Mod. 3. Hook *v.* Galloway. Mich. 2 W. 3.

25. The Declaration in an Action of Trover charged the Converſion of ſeventy Ounces of Cloves, Mace and Nutmegs, without ſhewing how many Ounces there were of each, or that they were all mixed together. This Declaration was holden to be certain enough: And by the Court—We will intend, that it was one Parcel of theſe three Spices mixed together. Ld. Raym. 588. Hartford *v.* Jones. Trin. 12 W. 3.

26. The Declaration in an Action of Trover, which charged the Converſion of two Bundles of Flax, was upon a Motion in Arreſt of Judgment holden to be certain enough; although the Quantity of Flax was not ſhewn. Ld. Raym. 991. Thornton *v.* Barnard, Trin. 2 Anne.

27. The Declaration in an Action of Trover, which charged the Converſion of fifty Pieces or Ends of Deal Boards, was holden to be certain enough: But the Reaſon given for its being ſo holden, namely that an End of a Board is amongſt Workmen well known to mean a Short Piece, ſhews, that 11 Mod. 66. Knight *v.* Barker, Mich. 4 Anne.

that the Word Piece, if it had ſtood alone, would not have been certain enough.

Str. 809. Anon. Trin 10 Ann.

28. The Declaration in an Action of Trover, which charged the Converſion *diverſorum Mercimoniorum*, Anglice *Earthen Ware*, was holden to be too uncertain.

Str. 738. Radley *v.* Rudge Hil. 13 G. 1.

29. The Declaration in an Action of Trover, which charged the Converſion of a Piece of Tape, was upon a Motion in Arreſt of Judgment holden to be certain enough; although it was not ſhewn how many Yards the Piece contained.

Ld. Raym. 1529. Bottomley *v.* Harriſon. Paſch. 1 G. 2.

30. The Declaration in an Action of Trover, which charged the Converſion of a Parcel of Packcloths, Rappers and Cords, was upon a Writ of Error holden to be certain enough: And by the Court—Courts of Juſtice do not at this Day require ſo much Certainty, as they formerly did in the Declaration in an Action of Trover. The Word Parcel, which is uſed in this Caſe, ought to be taken to mean an entire Thing, and the ſame as the Word Bundle. The Caſes upon this Point are not all to be reconciled; but we are of Opinion that the Declaration is certain enough.

Str. 827. White *v.* Graham, Hil. 2 G. 2.

31. The Declaration in an Action of Trover, which charged the Converſion of a Parcel of Diamonds, was holden by the Court of Common Pleas to be certain enough. Upon a Writ of Error in the Court of *King's Bench* it was ſaid, that this Caſe may well be diſtinguiſhed from the Caſe of *Bottomley* v. *Harriſon*; for that in the latter Caſe the Word Parcel was taken to mean an entire Thing, and the ſame as the Word Bundle: But that in the preſent Caſe, as every Diamond is a Diſtinct Thing, the Plaintiff ought to have ſhewn the Number of Diamonds. The Judgment was affirmed; and a Writ of Error being afterwards brought in the Houſe of Lords, it was affirmed there.

Str. 810. Haſlegrave *v.* Thompſon. Mich. 4 G. 2.

32. The Declaration in an Action of Trover, which charged the Converſion of fifty Pieces of Square Timber, was upon a Writ of Error holden to be certain enough, although the Quantity of Timber, which each Piece or which all the Pieces contained, was not ſhewn.

2 Barn. 222. Hobbs *v.* Green. Eaſt. 25 G. 2.

33. The Declaration in an Action of Treſpaſs charged the taking away of divers Quantities of China Ware, Earthen Ware and Linen. In order to arreſt the Judgment it was ſaid, that the Declaration was bad; becauſe it did not ſhew the Particulars of either Sort of Goods. It was on the other Side ſaid, that a great Degree of Certainty is not required in the Declaration in an Action of Treſpaſs, or in an Action of Trover: Becauſe no more Damages can be recovered in theſe Actions than are proved to have been ſuſtained The Declaration was holden to be certain enough.

Dyer 306. Fine's Caſe.

34. In the Declaration in an Action of Trover, for the Converſion of a Beaſt or Bird *Feræ Naturæ*, it muſt be ſhewn that the Beaſt or Bird was reclaimed; becauſe unleſs it were reclaimed the Plaintiff could not have any Property therein.

Cro. Ja. 262. Wilſon *v.* Chambers.

35. If an Action of Trover be brought for the Converſion of a Bond, it is not neceſſary to recite any Part of the Bond in the Declaration; for it may not be in the Power of the Plaintiff, who perhaps has not for ſome Time been in Poſſeſſion of the Bond, to recite any Part thereof truly; and a Miſrecital would be fatal.

Ld. Raym. 276 Arnold *v.* Jefferſon. Salk. 654.

36. If the Perſon, who has a ſpecial Property in a Bond, bring an Action of Trover for the Converſion of the Bond, he muſt alledge in his Declaration that it is *ſcriptum ſuum Obligatorium*, in the ſame Manner as the Obligee himſelf muſt have done if the Action had been brought by him; for, as the Action is not brought for the Converſion of the Money due upon the Bond, but for the Converſion of the Bond, the Words *ſcriptum ſuum Obligatorium* are neceſſary, in order to ſhew of what Kind the Writing is.

37. It

37. It is laid down in one Book, that if an Action of Trover be brought for the Converſion of a living Chattel, it muſt be alledged in the Declaration, that the Chattel was of a certain Price; and that if this Action be brought for the Converſion of a dead Chattel, it muſt be alledged in the Declaration, that the Chattel was of a certain Value. Cro. Ja. 130. Wood v. Smith.

38. But it is in another Book laid down, that, whether an Action of Trover be brought for the Converſion of a living or dead Chattel, it is quite indifferent which Set of Words, *of the Price*, or *of the Value*, are made uſe of the Declaration. Fitz. N. B. 88.

39. The Value of the Chattel, for the Converſion of which an Action of Trover is brought, ought to be ſhewn in the Declaration. 2 Roll. Rep. 447. Goodwin v. Harwood

40. But the Juſtices of Court of *King's Bench* were in one Caſe divided in Opinion, whether the want of ſhewing, in the Declaration in an Action of Trover, the Value of the Chattel be not ſuch a Matter of Form, as is after a Verdict cured by the Statutes of Jeofails. Cro. Ja. 130. Wood v. Smith.

41. It is the uſual and the more proper Way, for the Plaintiff in an Action of Trover to alledge in his Declaration, that the Chattel came to the Hands of the Defendant by Finding; but it is ſaid, to be ſufficient, to alledge generally, that it came to the Hands of the Defendant. 2 Bulſtr. 313. Iſaac v. Clark.

42. The Venue in an Action of Trover may be laid in *England*, for the Converſion of a Chattel in *Ireland*. Salk. 290. Brown v. Hodges. 8 Mod. 322.

43. If the Finding of the Chattel, for the Converſion of which an Action of Trover is brought, be in one County, and the Converſion in another, the Venue may be laid in either County; or, as this Action is tranſitory, it may be laid in any other County.

44. It is not neceſſary to lay the Venue in an Action of Trover at the Place where the Converſion was: But the Declaration in ſuch Action is bad, unleſs ſome Place be alledged: Becauſe, unleſs a Converſion at a Place certain be found by the Jury, the Plaintiff is not intitled to Judgment. Cro. Eliz. 78, 98. 2 Bulſtr. 313. Cro. Car. 525.

45. It is in one Caſe laid down, that, although the Declaration in an Action of Trover alledge the Finding to have been at a Place certain, if it do not expreſly alledge that the Converſion was at a Place certain, it is bad. 1 Roll. Rep. 132. Matthew v. Stranſon, Mich. 26 Eliz.

46. But it is laid down in a ſubſequent Caſe, that if the Finding be alledged at a Place certain, it is not neceſſary to alledge that the Converſion was at a Place certain. 2 Bulſt. 206. Atkins v. Wheeler. Paſch. 10. Ja. 1.

47. In the Declaration in an Action of Trover it was alledged, that the Chattel came to the Defendant's Hands by Finding upon the fourth Day of *May* in a certain Year, and that afterwards, *ſcilicet* on the firſt Day of *May* in the ſaid Year, he converted the Chattel. Upon a Motion in Arreſt of Judgment it was ſaid, that this Declaration is not good; becauſe the Converſion is alledged to have been before the Finding: But it was holden to be good: And by the Court—As the Words, that afterwards he converted the Chattel, are a ſufficient Allegation, that the Converſion was after the Finding, that which is contained under the *ſcilicet* is repugnant to theſe Words, and muſt be rejected as Surpluſage. Cro. Ja. 428. Teſmond v. Johnſon.

2. Of the Plea.

Cro. Eliz. 146, 434. Salk. 654. 3 Bulſtr. 209. Ld. Raym. 393.

48. The Defendant in an Action of Trover cannot juſtify; becauſe the Converſion muſt be confeſſed by a Plea of Juſtification, which, it being a tortious Act, never can be juſtified.

Bro. Act. ſur le Caſe, pl. 109.

49. The Defendant in an Action of Trover cannot plead, that the Plaintiff was not poſſeſſed of the Chattel charged to have been converted as of his own proper Goods: Nor is there any Neceſſity for him to plead this; becauſe the Plaintiff cannot recover, unleſs he prove a Property in himſelf.

Cro. Eliz. 434. Aſcue v. Saunderſon.

50. In an Action of Trover the Defendant a Sheriff pleaded, that he had levied and ſold the Goods under a *Fieri Facias*, which is the ſame Converſion, *abſque hoc* that he converted them *aliter vel alio modo*. This Plea was holden to be bad: And by the Court.—The Defendant ought to have pleaded Not guilty, and might have given the Matter pleaded in Evidence.

Allen v. Harris. Lutw. 1538.

51. But it may be inferred from one Caſe, that the Defendant in an Action of Trover may plead the Payment of Money, before the Action was brought, in Satisfaction of the Converſion.

Cro. Eliz. 667. Ferrers v. Arden, Mich. 40 Eliz.

52. The Converſion of an Ox, being charged in the Declaration in an Action of Trover, the Defendant pleaded, that the Plaintiff had before brought an Action of Treſpaſs againſt *J. S.* and two others for the taking of an Ox upon a Day certain; that the Defendants in that Action pleaded in Juſtification, that the Taking was in Right of the Defendant in the preſent Action; that upon a Demurrer to this Plea there was Judgment for the Defendants; that the Plaintiff in the preſent Action and in the former is the ſame Perſon; that the Ox charged to have been converted in the preſent Action and the Ox charged to have been taken in the former Action is the ſame Ox; that the Converſion, charged to have been committed by the Defendant in the preſent Action, if any have been, was committed by him together with the Defendants in the former Action; that the Defendant in the preſent Action was by Covin not made a Party to the former Action; and that the Defendants in the former Action are by Covin not made Parties to the preſent Action, which is brought for one and the ſame Treſpaſs, Thing and Matter, as the former. The Defendant concluded with praying Judgment, whether, as there was Judgment for the Defendants in the former Action, the Plaintiff ought to maintain the preſent Action. Upon a Demurrer to this Plea *Walmſley* J. and *Kinſmill* J. were of Opinion that it is good; and by them; as the Property in the Ox was by the Judgment in the former Action determined to be in the preſent Defendant, in whoſe Right the Defendants in that Action juſtified, the Plaintiff could not have maintained the preſent Action againſt them; and it is not reaſonable, that he ſhould maintain it againſt the preſent Defendant; becauſe, although he were not a Party to the Record in the former Action, he was a Party to the Treſpaſs, and as ſuch has a Right to avail himſelf, in pleading to the preſent Action, of any Thing contained in that Record. *Anderſon* Ch. J. and *Glanville* J. agreed, that the preſent Defendant may avail himſelf, in Pleading to the preſent Action, of any Thing contained in the Record of the former Action: But they were nevertheleſs of Opinion, that the Plea is not good; and by them a Judgment in an improper Action can never be pleaded in Bar to a proper Action for the ſame Cauſe. For Inſtance, If *J. S.* who has delivered Goods to *J. N.* to keep, bring an Action of Treſpaſs againſt *J. N.* for taking the Goods, and there be Judgment againſt *J. S.* he may notwithſtanding this Judgment maintain

maintain an Action of Detinue againſt *J. N.* for the Goods; becauſe the former Action was miſconceived. *Walmſley* J. agreed, that if the Defendant in an Action of Treſpaſs for taking Goods plead Not guilty, and there be Judgment for him, this Judgment cannot be pleaded in Bar of an Action of Trover for the Converſion of the Goods; becauſe, for any Thing that appears upon the Record to the contrary, the Action may have been miſconceived: But if a Title to the Goods is pleaded in the Action of Treſpaſs, and there be Judgment for the Defendant, this Judgment may be pleaded in Bar of an Action of Trover for the Converſion of the Goods; becauſe the Property in the Goods is thereby determined to be in the Defendant. The Reporter adds, that the Cauſe was afterwards referred to Arbitrators.

53. In another Report of this Caſe it is ſaid to have been reſolved, that a Judgment in one perſonal Action may in all Caſes be pleaded in Bar to another perſonal Action for the ſame Cauſe. 6 Rep. 7. Ferrer's Caſe.

54. The Declaration in an Action of Trover charged the Converſion of a hundred Sheep on the thirtieth Day of *April*, in the nineteenth Year of the late King, the Defendant pleaded Not guilty as to eleven of the Sheep; and as to the other eighty-nine, that the Plaintiff had heretofore in an Action of Treſpaſs declared againſt him for taking and driving away an hundred Sheep, on the fourteenth Day of *April* in the ſame Year; that to this Action he pleaded Not guilty as to eleven of the Sheep, and as to the other eighty-nine he pleaded a Recovery of ſixty Pounds, in an Action of Debt brought by him againſt *J. S.*; that *J. S.* being poſſeſſed of eighty-nine Sheep they were levied by Virtue of a Writ of *Fieri Facias* and ſold to him; and that thereupon he took Poſſeſſion of the Sheep; that Iſſue being joined upon this Plea there was a Verdict for the Plaintiff with two Pence Damages; and that the Plaintiff entered up Judgment for the Damages and his Coſts. The Defendant then averred, that the taking and driving away of eighty-nine Sheep, for which the Plaintiff recovered in the Action of Treſpaſs, and the Converſion of eighty-nine Sheep charged in the preſent Action is the ſame Treſpaſs, Thing and Matter; and that the Judgment is ſtill in Force. To this Plea the Plaintiff replied, that true it is, that he did recover in the ſaid Action of Treſpaſs two Pence Damages for the taking and driving away of the ſaid eighty-nine Sheep: but he averred, that the ſaid two Pence Damages were not aſſeſſed for the Value of the ſaid Sheep; and that the Defendant on the Day mentioned in the Declaration converted the ſaid eighty-nine Sheep. He then traverſed, that the taking and driving away charged in the Action of Treſpaſs, whereupon Judgment was given, is the ſame Treſpaſs, *quoad* the Converſion, whereof he now complains. Upon a Demurrer to this Replication there was Judgment for the Plaintiff; but the Court were not unanimous in Opinion. *Croke* Ch. J. *Hutton* J. and *Harvey* J. who were of Opinion that the Replication was good, ſaid, that the Damages given in the Action of Treſpaſs were ſo ſmall, that the Court muſt intend them to have been given only for taking and driving away the Sheep; for that, if it ſhould be intended, they were given as a Recompence for the Sheep, the Plaintiff would be deprived of his Property in eighty-nine Sheep, and have only two Pence for them. The Court, rather than ſuffer ſo great a Hardſhip, will intend, that the Plaintiff had his Sheep again; and that he loſt them afterwards, and that the Defendant found and converted them. It is moreover confeſſed in the preſent Action by the Demurrer, that the Converſion was ſubſequent to the taking and driving away charged in the Action of Treſpaſs; for the taking and driving away charged in that Action, is alledged to have been upon the fourteenth Day of *April*, in the nineteenth Year of the late King; but the Converſion, for which the preſent Action is brought, is alledged to have been upon the thirtieth Day of *April* in the ſame Year. *Yelverton* J. who was of Opinion that the Re- Cro. Car. 35. Lacon v. Barnard. Paſch. 2 Car. 1.

plication was bad, ſaid, that as it is averred in the Declaration in the Action of Treſpaſs, that the Defendant did take and drive away the Sheep, this implies, that he did ouſt the Plaintiff of his Poſſeſſion of the Sheep and had them himſelf; and if this were ſo, the Court ought now to intend, that the Damages, although ſo very ſmall, were given as a Recompence for the Sheep.

3 Mod. 2. Putt v. Rawſtern, Mich. 34 Car. 2.

55. In an Action of Treſpaſs for taking Goods, Iſſue was joined upon the Plea of Not guilty; and there was a Verdict and Judgment for the Defendant. The Plaintiff in that Action afterwards brought the preſent Action of Trover againſt the ſame Defendant, for the Converſion of the ſame Goods. The Defendant pleaded the Judgment in the former Action in Bar of the latter, and the Queſtion upon a Demurrer was, whether this Plea be good. For the Plaintiff the Caſe of *Lacon* and *Barnard* was relied upon; and in anſwer to what is to have been reſolved in *Ferrer*'s Caſe, that a Judgment in one perſonal Action may in all Caſes be pleaded in Bar to another perſonal Action for the ſame Cauſe, it was ſaid this can only be true as to two perſonal Actions, in which the ſame Evidence will be ſufficient to maintain both: But that the Evidence, which is in many Caſes ſufficient to prove a Converſion of Goods, and conſequently to maintain an Action of Trover, is not ſufficient to maintain an Action of Treſpaſs; becauſe in the latter Action the Poſſeſſion of the Goods muſt be proved to have been tortiouſly obtained. It was further ſaid, that the Court may in the preſent Caſe very well intend, that the Plaintiff was miſtaken in bringing an Action of Treſpaſs; and if this were ſo, a Judgment in an improper Action can never be pleaded in Bar of one that is proper. *Pemberton* Ch. J. *Jones* J. and *Raymond* J. were of Opinion that the Plea is bad, and Judgment was given for the Plaintiff: But *Dolben* J. did very much doubt.

2 Ventr. 170. Lechmere v. Toplady, Paſch. 2 W. 3.

56. The Converſion of ten Pipes of Wine being charged in the Declaration in an Action of Trover, the Defendant pleaded, that the Plaintiff had heretofore in an Action of Treſpaſs declared againſt him for taking and carrying away ten Pipes of Wine; that he had pleaded Not guilty to the Declaration in that Action; and that upon a ſpecial Verdict, which is ſet forth, there was a Judgment for him. He then averred, that the Goods, for the Converſion of which the preſent Action is brought, are the ſame Goods for the taking and carrying away of which the former Action was brought. Upon a Demurrer to this Plea it was ſaid, that an Action of Trover will lie in many Caſes wherein an Action of Treſpaſs will not, and the Caſe of *Putt* and *Rawſtern* was relied upon. In anſwer to this it was ſaid, that it appears in the preſent Caſe, from the ſpecial Verdict, in the Action of Treſpaſs, which is ſet forth in the Plea, that the Judgment was upon the Merits; whereas in the Caſe of *Putt* and *Rawſtern*, as the Verdict in the Action of Treſpaſs was a general one, it could not appear, that the Verdict was not founded upon a Miſtake of the Action. The Juſtices were of Opinion that the Plea is good; but by Reaſon of the Judgment in the Caſe of *Putt* and *Rawſtern*, and of the Importunity of the Plaintiff's Counſel, Leave was given to argue the Caſe again.

1 Show. 146.

57. In another Report of this Caſe it is ſaid, that all the Juſtices were of Opinion, upon the Authority of what is ſaid to have been reſolved in *Ferrer*'s Caſe, that the Plea is good. The Reporter adds, that *Pollexfen* Ch. J. ſaid, he had never been ſatisfied with the Judgment in *Putt* and *Rawſtern*, which upon the bringing of a Writ of Error was as he well remembered agreed; for that he ſaw no Difference, betwixt that Caſe, wherein the Judgment pleaded was given upon a general Verdict, and the preſent Caſe, wherein the Judgment pleaded was given upon a ſpecial Verdict.

Ld. Raym. 217. Lamine v. Dorrel.

58. It has been holden, that if *J. S.* after converting the Goods of *J. N.* ſell them, *J. N.* may recover the Money for which they were ſold

in

in an Action of *Aſſumpſit* againſt *J. S.* and that if *J. N.* afterwards bring an Action of Trover for the Converſion of the Goods, *J. S.* may plead the Judgment in the Action of *Aſſumpſit* in Bar of the Action of Trover.

(G) Of Evidence in an Action of Trover.

1. IT is incumbent upon the Plaintiff in an Action of Trover to prove, that he had a Property in the Chattel for the Converſion of which the Action is brought, and that he was poſſeſſed thereof at the Time of the Converſion.

2. It is neceſſary for the Plaintiff in an Action of Trover to prove, that the Chattel came to the Hands of the Defendant. But it is not neceſſary for him to prove, in what Manner it did come to the Defendant's Hands; the Converſion being the Giſt of an Action of Trover. Moor 841. Iſaac v. Clerk.

3. If the Defendant in an Action of Trover came to the Poſſeſſion of the Chattel by a tortious Taking, it is not neceſſary for the Plaintiff to prove a Refuſal to deliver it; for the tortious Taking is in itſelf a Converſion. 1 Sid. 264. Bruen v. Roe.

4. But if the Defendant came to the Poſſeſſion of the Chattel by Finding, or in any other lawful Way, it is neceſſary for the Plaintiff to prove a Refuſal to deliver it. Moor 460. Cro. Car. 262. 6 Mod. 212.

5. If the Defendant in an Action of Trover, who came to the Poſſeſſion of the Chattel, by finding, or in any other lawful Way, have intermeddled unlawfully therewith, it is not neceſſary for the Plaintiff to prove a Refuſal to deliver it; for the unlawful Intermeddling is, as has been already ſhewn, a Converſion. Ante, 258.

6. It is in the general true, that Evidence of a Refuſal to deliver the Chattel for the Converſion of which an Action of Trover is brought, is Evidence of a Converſion. But ſuch Evidence is not in every Caſe Evidence of a Converſion. 1 Roll. Abr. 5. P. pl. 3. Hob. 187. 2 Show. 179. Salk. 655.

7. Although it be proved, that the Defendant in an Action of Trover did refuſe to deliver the Piece of Timber which lies upon his Land: Yet if it be proved, that the Defendant did never intermeddle with the Piece of Timber, Evidence of a Refuſal to deliver it is not Evidence of a Converſion; in as much as the Defendant is not in ſuch Caſe guilty of a Malfeaſance. 2 Bulſt. 310. Iſaac v. Clerk. 2 Mod. 245.

8. If it appear, that the Chattel was loſt by the Defendant, or that he was robbed thereof, before it was demanded, Evidence of a Refuſal to deliver it is not Evidence of a Converſion; for it would be very hard to puniſh the Defendant as a Wrong-Doer, becauſe he did not deliver a Chattel, which was not in his Power at the Time the Demand was made: But it is in ſuch Caſe neceſſary for the Defendant to prove, that the Chattel was loſt, or that he was robbed thereof, before the Demand was made. 1 Roll. Abr. 6. pl. 4. Salk. 655.

9. If the Defendant in an Action of Trover had a Right to detain the Chattel, until a certain Sum of Money was paid, Evidence of a Refuſal to deliver the Chattel is not Evidence of a Converſion, unleſs the Money were paid or tendered before a Demand thereof was made. Ante, 269.

10. In an Action of Trover by an Adminiſtrator he declared for the Finding and Converſion of the Rum of his Inteſtate. The Evidence was, that the Rum was taken by the Defendant during the Life of the Inteſtate; but that it was not made uſe of by the Defendant until the Inteſtate was dead. Str. 60 Croſier v. Ogilby.

dead. This Evidence was holden to be ſufficient to maintain the Action: And by the Court.—As the Plaintiff was ignorant of the Time of uſing the Rum, the Defendant ought, if he would avail himſelf thereof, to have diſcloſed this in his Plea; but if he had done it, the Evidence, of his taking the Rum during the Life of the Inteſtate and keeping it until his Death, would have been ſufficient to maintain the Action.

11. Every Thing, which tends to prove that the Defendant has not been guilty of a Converſion, may be given in Evidence in an Action of Trover upon the General Iſſue.

Salk. 654. Hartford *v.* Jones. 12. A Carrier, who is Defendant in an Action of Trover, may give in Evidence upon the General Iſſue, that he refuſed to deliver the Goods, becauſe the Money due for the Carriage of them had not at the Time of a Demand been paid or tendered; for unleſs this Money were paid or tendered before the Demand was made, he has not been guilty of a Converſion. And without mentioning any other Inſtance of the like Kind it may in the general be obſerved, that wherever the Defendant in an Action of Trover had a Right at the Time of a Demand to detain the Chattel, he may give this Right in Evidence upon the General Iſſue; becauſe the Defendant has not in any ſuch Caſe been guilty of a Converſion.

Salk. 290. Brown *v.* Hodges. 13. If one Joint-owner of a Chattel bring an Action of Trover againſt another Joint-owner, the Defendant may give in Evidence upon the General Iſſue, that he is Joint-owner with the Plaintiff; becauſe this, which ſhews a Right in him to the Poſſeſſion of the Chattel, does, at the ſame Time ſhew that he has not been guilty of a Converſion: But if one Joint-owner of a Chattel bring an Action of Trover againſt a Stranger, the Defendant cannot give in Evidence upon the General Iſſue, that *J. S.* is Joint-owner with the Plaintiff.

Ld. Raym. 1217. Lamine *v.* Dorrel. 14. If the Money, for which *J. S.* did after converting the Chattel of *J. N.* ſell it, have been recovered by *J. N.* in an Action of *Aſſumpſit*, and *J. N.* do afterwards bring an Action of Trover for the Converſion of the ſame Chattel, the Judgment in the Action of *Aſſumpſit* may be given in Evidence in the Action of Trover upon the General Iſſue; becauſe as it appears from this Judgment, that the Plaintiff has recovered the Value of the Chattel, it does likewiſe appear, that he has no Property therein; and conſequently that the Defendant has not been guilty of a Converſion.

VERDICT.

VERDICT.

THE Word Verdict is derived from the two *Latin* Words *Veritatis Dictum.*

Coſts and Damages, which might very well have been treated of under this Title, have been treated of under the Titles *Coſts* and *Damages.*

The remaining Matter, which appertains to this Title ſhall be ranged in the following Order.

(A) Of a Verdict de bene Eſſe.
(B) Of a Privy Verdict.
(C) Of a general Verdict.
(D) Of a Special Verdict.
(E) Of the Province of the Court where a Special Verdict is found.
(F) Of a Verdict in which the Jurors did not all agree.
(G) Of the Power of the Jury to depart from a general Verdict, after it is given in open Court.
(H) In what Caſes a Verdict is bad, on Account of Misbehaviour in one or more of the Jurors.
(I) In what Caſes a Verdict is bad, on Account of Misbehaviour in one of the Parties.
(K) Of a Verdict upon an informal or immaterial Iſſue.
(L) Of a Verdict upon an Iſſue, Part of which is inſenſible or inſufficient.
(M) Of a Verdict which does not find all that is in Iſſue.
(N) Of a Verdict which finds a Thing that is not in Iſſue.
(O) Of a Verdict which varies from the Iſſue.

1. In an Action of *Aſſumpſit.*
2. In an Action upon the Caſe.
3. In an Action of Covenant.
4. In an Action of Debt.
5. In an Action of Ejectment.
6. In an Action of Replevin.
7. In an Action of Treſpaſs.
8. In divers other Actions.
9. In a criminal Proſecution.

(P) Of

(P) Of a Verdict where the Words Modo et Forma are used in the Traverse upon which Issue is joined.
(Q) Of a Verdict which does not find the Matter in Issue with Certainty.
(R) Of a Verdict which does not find the Matter in Issue expressly.
(S) Of a Verdict which finds a Matter in a Foreign County.
(T) Of a Verdict which is contrary to a Matter of Record.
(U) Of a Verdict which is contrary to a Matter of Estoppel.
(W) Of a Verdict which is contrary to something that is confessed, or not denied, in the Pleadings.
(X) What Omission in the Pleadings is cured by a Verdict.
(Y) What Mistake, or Omission, in the Copy of the Issue delivered is cured by a Verdict.
(Z) Of divers Things, which did not fall properly under any of the foregoing Heads.

(A) Of a Verdict De bene Esse.

Brown Meth. 13.

1. IF the Judge, before whom a Cause is tried, have a Doubt as to the Propriety of finding a Verdict, he may direct the Jury to find one *De bene Esse*; which Verdict, if the Court shall be of Opinion that a Verdict ought to have been found, shall stand.

Bro. Protect. P. 30.

2. If an Action of Debt be brought against a Husband and Wife, and at the Trial of the Cause the Wife make Default, and a Protection be cast for her, the Judge may direct the Jury to find a Verdict *De bene Esse*; which, if the Protection be disallowed by the Court, shall stand.

(B) Of a Privy Verdict.

1 Inst. 228.

1. A Privy Verdict is so called; because what is thereby found ought to be kept secret, until a Verdict is given in open Court.

1 Inst. 227. Moor 33.

2. A Jury may find differently by a Verdict given in open Court from what they found by Privy Verdict.

Plowd. 211. Saunders v. Freeman. Dyer 217.

3. The Jury, who by a Privy Verdict had found for the Defendant, did by a Verdict given in open Court find for the Plaintiff. Both Verdicts being returned upon the *Postea*, it was holden that the latter should stand: And by the Court—The Verdict given in open Court is the binding Verdict, the other being only allowed for the Ease of the Jury.

4. It

4. It is in one Book laid down, that a Privy Verdict cannot be given in a Caſe of Life or Member. 1 Inſt. 227.

5. In two other Books it is laid down, that a Privy Verdict cannot be given in a Caſe of Felony; becauſe the Jury are directed and ought in ſuch Caſe to look upon the Priſoner when they give their Verdict. Raym. 193. Rex v. Ladſingham. 1 Ventr. 97.

6. But it is in theſe Books ſaid, that, wherever the perſonal Appearance of the Defendant is not neceſſary, the Jury may give a Privy Verdict, and that it is uſual ſo to do. Raym. 193. Rex v. Ladſingham. 1 Ventr. 97.

7. In an Information for a Miſdemeanor the Jury had given a Privy Verdict. The Verdict afterwards given in open Court was upon this Account objected to; but it was holden to be good. Raym. 193. Rex v. Ladſingham. 1 Ventr. 97.

(C) Of a general Verdict.

1. A General Verdict is ſo called; becauſe the whole Matter in Iſſue is thereby found generally.

2. If the Venue in an Action of Aſſault and Battery be laid in the Pariſh of *A.* the Jury ſhall not be received to ſay, that the Defendant is Not guilty in the Pariſh of *A.* for the Jury muſt either find the whole Matter in Iſſue Specially, or they muſt find generally that the Defendant is or is not guilty. 2 Roll. Abr. 694. U. pl. 1.

3. The Jury may in any Caſe, if they will take upon themſelves the Knowledge of the Law, find a general Verdict: But it is in ſome Caſes dangerous for them ſo to do; for if they miſtake the Law, they run themſelves into the Danger of an Attaint. It is therefore the ſafer Way, for the Jury to find a Special Verdict in a Caſe which appears to them doubtful. 1 Inſt. 228. 4 Rep. 54.

(D) Of a Special Verdict.

1. A Special Verdict is ſo called; becauſe ſome Matter of Fact is thereby found ſpecially.

2. The Deſign of a Special Verdict is to ſubmit ſome Queſtion of Law, which ariſes upon the Matter of Fact found Specially, to the Conſideration of the Court.

3. It ſeems to have been always holden, that if the general Iſſue be pleaded, the Jury may find a Special Verdict. Bro. Verd. pl. 45. pl. 56. pl. 85.

4. It is laid down in two Books, that if an Iſſue be joined upon a ſpecial Plea, the Jury cannot find a ſpecial Verdict. Bro. Verd. pl. 45. Dyer 117.

5. But it is laid down in another Book, that although there be Caſes to the contrary, it is ſettled, that the Jury may find a Special Verdict as to the Matter in Iſſue upon a Special Plea; for that a Queſtion of Law may as well ariſe in ſuch Caſe, as where the general Iſſue is pleaded. 1 Inſt. 226, 227.

6. And

9 Rep. 12. Dowman's Case.

6. And in another Book it is said to have been holden, that in all Pleas of the Crown, and in every Civil Action, whether it be real, personal or mixed, in which an Issue is joined betwixt the King and a Party, or betwixt Party and Party, the Jury may find a Special Verdict.

1 Inst. 228. 9 Rep. 12.

7. It is said, that the Court cannot refuse to receive a Special Verdict, provided the Matter specially found be pertinent to the Issue; for that the Jury have a Right to find such Verdict in every Case which appears to them doubtful.

1 Inst. 228. Vaugh. 145. Ld. Raym. 1494. Fost. 256, 257.

8. But, although the Jury may find a Special Verdict in every Case which appears to them doubtful, it is not necessary, even for their own Safety, to do this in every such Case

1 Inst. 228. Vaugh. 145. Ld. Raym. 1494. Fost. 256, 257.

9. For if the Judge before whom the Cause is tried take upon himself to determine the Question of Law, concerning which the Jury doubt, and direct them to find a General Verdict, they may without Danger to themselves find such Verdict.

2 H. H. P. C. 303. Fost. 279.

10. If upon the Trial of a Person indicted for Murder it appear, that at the Time of the Homicide he was insane, the Jury may, upon being informed by the Judge that an insane Person cannot be guilty of Murder, it being a Maxim of Law that *Crimen non contrahitur nisi Voluntas sit nocendi*, find a general Verdict of Not guilty.

2 H. H. P. C. 303. 1 Hawk 70. Fost. 279.

11. If upon the Trial of a Person indicted for Murder, the Judge be upon all the Circumstances of the Case of Opinion, that the Homicide is justifiable, the Jury may find a general Verdict of Not guilty.

12. If upon the Trial of a Person indicted for Murder, the Judge be upon all Circumstances of the Case of Opinion, that the Homicide amounts to Manslaughter, the Jury may find a Verdict of Manslaughter.

Ld. Raym. 1494. Fost. 256, 257.

13. It is said, that if the Jury are dissatisfied with the Determination of the Judge, as to the Question of Law concerning which they doubt, they are not obliged to follow his Direction; but may find a Special Verdict.

Ld. Raym. 1494. Fost. 256, 257.

14. But it is likewise said, that the Jury will, if they are well advised, find a General Verdict, in every Case wherein the Judge does determine the Question of Law concerning which they doubt, and direct them to find such Verdict.

1 Inst. 227. 4 Rep. 54.

15. Nor are they in such Case, although the Judge should be mistaken liable to an Attaint; for as it is only said, *that the Jury are liable to an Attaint, where they will take upon themselves the Knowledge of the Law and mistake the Law*, it follows, that they are not liable thereto, when they find according to the Direction of the Judge.

2 Lill. Abr. 781. F.

16. The Minutes for a Special Verdict are to be approved of by the Judge; it being his Province to take Care that the Question of Law be fairly stated, and they ought to be delivered to the Jury before they find the Verdict.

2 Lill. Abr. 790. H.

17. If this be not done, the Jury may without incurring the Danger of an Attaint find a General Verdict.

18. The Minutes for a Special Verdict intended to be found ought to be signed by one of the Counsel for each Party.

2 Lill. Abr. 793. G.

19. But if all the Counsel for one of the Parties refuse to sign the Minutes for a Special Verdict, the Judge may direct the Jury to find one from the Minutes as signed by one of the Counsel for the other Party.

2 Lill. Abr. 790. E.

20. It is the Duty of the Party, at whose Instance a Special Verdict was found, to draw it up from the Minutes: But either of the Parties may draw

draw it up; and if one of them do this, and the other neglect to pay his Share of the Expence, the Court will not hear Counsel for him when the Verdict is set down for Argument.

21. If a Special Verdict be not drawn up according to the Minutes, as signed and approved of at the Trial of the Cause, the Court may order it to be amended from the Minutes. 2 Lill. Abr. 790. D.

22. If the Question of Law be not properly stated in a Special Verdict, and the Verdict cannot be amended from the Minutes, as signed and approved of at the Trial of the Cause, the Court may order it to be amended from the Notes of the Judge before whom the Cause was tried. Ibid.

23. It is in one Book laid down generally, that the Court may order a Special Verdict to be amended, from the Notes of the Judge, in such Manner as to bring the Question of Law properly before the Court. 2 Lill. Abr. 797. H.

24. It is in another laid down, that the Court may order a Special Verdict to be amended as to a Matter of Fact, from the Notes of the Judge before whom the Cause was tried. 2 Roll. Abr. 701. pl. 16.

25. In an Action of Trover it was found by a Special Verdict, that the Defendant, who was a considerable Farmer, did annually buy and sell for Gain divers large Quantities of Potatoes, and the Question submitted to the Court was, whether he was a Trader within the Meaning of any Statute of Bankruptcy. The Court inclined to be of Opinion, that he was: But a Doubt arose, whether it was not necessary for the Jury to have found the Quantity of Potatoes which the Defendant did annually buy and sell, that the Court might be better able to judge, how far he sought his Living by buying and selling. *Pratt* Ch. J. did not think it necessary, that this Quantity should be found; it being in his Opinion sufficient, if the Defendant did in any Degree seek his Living by buying and selling. *Eyre* J. and *Fortescue* J. being of a different Opinion, the Cause was adjourned. A Motion was afterwards made, upon an Affidavit of the Quantity, which was at the Trial of the Cause proved to have been annually bought and sold, that a *Venire Facias de Novo* might be awarded. This was not awarded: But the Special Verdict was ordered to be amended as to this. The Reporter adds, that it was so amended; and that at another Day Judgment was given for the Plaintiff. Str. 513, 514. Mayo v. Archer.

26 It seems however to be the better Opinion, that the Court cannot order a Special Verdict to be amended as to a Matter of Fact.

27. It is in one Case laid down, that if the proper Facts are not found by the Special Verdict, the Court will not hear the Question of Law argued; because no Judgment can be given upon the Verdict: But will award a *Venire Facias de Novo*, that the proper Facts may be found. 2 Lill. Abr. 790. D. 792. B.

28. In another Case it is laid down, that if a proper Fact be omitted in the Minutes for a Special Verdict, the Court cannot order the Verdict to be amended as to this, although the Counsel for both Parties consent thereto; for that this would amount to making a new Verdict as to that Fact by the Court and Counsel. It is added, that the Court will in such Case award a *Venire Facias de Novo*. 2 Lill. Abr. 791. B.

29. In another Case it is laid down, that a Special Verdict, in which the Jury have omitted to find a proper Fact, is not good; for that the Court will never determine the Question of Law, unless every proper Fact be found by the Jury. Gilb. Eq. Rep. 255, 256. Lodge v. Jennings.

30. The Opinion, that the Court has no Power to amend a Special Verdict as to a Matter of Fact, is moreover confirmed by divers Cases: In which it is laid down, not only that every proper Fact must be found by the Jury, but also that it must be found expressly; it not being sufficient for the Jury to find Evidence or Circumstances, from which the Court may fairly infer a Fact.

31. The Matter in Issue was, whether *J. S.* had resigned a Benefice to a Bishop. The Jury found an Instrument, under the Seal of the Bishop, upon Noy 147. Smith v. Foaves.

upon which there was an Indorſement that *J. S.* did reſign the Benefice to him, and that he accepted the Reſignation. The Verdict was holden to be bad; becauſe it did not find expreſsly, that *J. S.* had reſigned the Benefice.

2 Roll. Abr. 693. S. pl. 1. 32. An Eſtate having been granted by Copy of Court Roll to three Perſons for their Lives, the Matter in Iſſue was, whether a Heriot was by the Cuſtom of the Manor due upon the Death of one of them. The Jury found, that the Cuſtom of the Manor did not warrant the granting of an Eſtate for three Lives. The Verdict was holden to be bad; becauſe it did only find argumentatively, that a Heriot ought not in the preſent Caſe to be paid; whereas the Jury ought to find every Fact expreſsly.

2 Roll. Abr. 693. S. pl. 2. 33. If the Matter in Iſſue be, whether an Eſtate may by the Cuſtom of a Manor be granted by Copy of Court Roll for two Lives, and the Jury find, that an Eſtate may by the Cuſtom of the Manor be granted for three Lives, the Verdict is bad; becauſe it is only Argumentative to ſay, that, in as much as a greater Eſtate may by the Cuſtom of the Manor be granted, a leſſer one may.

12 Mod. 628. Rex v. Plummer. 34. If the Conſequence of the Verdict upon an Indictment may be Corporal Puniſhment, every proper Fact muſt be found expreſsly; it not being ſufficient for the Jury to find either Evidence or Circumſtances, from which the Court may fairly infer a Fact.

(E) Of the Province of the Court where a Special Verdict is found.

11 Rep. 10. Priddle's Caſe. 1. IF the Jury, after finding a Fact ſpecially, take upon themſelves to draw a Concluſion not warranted by Law, the Court ought not in giving Judgment to pay any Regard to the Concluſion of the Jury; becauſe they ought not to have drawn ſuch Concluſion.

Bro. Verd. pl. 41. 2. If the Iſſue in an Aſſize be, whether there is a Seiſin, and the Jury, after finding ſome Fact ſpecially, conclude with ſaying that this amounts to a Seiſin, the Court, without paying any Regard to the Concluſion of the Jury, will judge whether the Fact found do amount to a Seiſin.

Dyer 362. Anon. Hob. 53. 3. In an Action againſt an Executor, the Iſſue was whether he had Aſſets in his Hands. The Jury found, that the Defendant's Teſtator, in a Leaſe granted by him, had reſerved a Rent to himſelf his Heirs and Aſſigns, and that the Defendant had received the Rent from the Time of his Teſtator's Death; and they concluded with ſaying that this is Aſſets. The Court held the Concluſion to be void; becauſe it appeared from the Fact found, that the Rent ran with the Reverſion, and conſequently that, as it did not belong to the Executor but to the Heir, it was not Aſſets.

Vaugh. 77. Rowe v. Huntingdon. 4. If the Jury find a Deed ſpecially, they ought to find it *in hæc verba*, and not to find what they judge to be the Subſtance of the Deed, that the Court may have an Opportunity of inſpecting the Deed, in order to put a Conſtruction thereupon: But if the Deed be loſt, it is the Duty of the Jury to find the Subſtance thereof, in Caſe this be proved.

5 Rep. 97. Goodall's Caſe. 5. The Court will never entertain a Doubt, concerning any Thing that is not ſubmitted to their Conſideration by a Special Verdict: But will on the contrary intend every Thing which can be fairly intended, in order to ſupport the Verdict.

Cro. Ja. 63. Fairchild v. Gayre. Hob. 269. 6. The Queſtion ſubmitted to the Court by a Special Verdict was, whether the Reſignation of a Donative to the Donor be good; but it was not found that the Donor had accepted the Reſignation. It was holden, that

that the Acceptance of the Reſignation ſhould be intended: And by the Court—The Queſtion ſubmitted to our Conſideration is, whether the Reſignation of a Donative to the Donor be good; and we will never entertain a Doubt as to any Thing whereof the Jury have not doubted.

7. In an Action of *Ejectione firmæ* the Jury found, that the Premiſſes in Queſtion were granted by Letters Patent of King *Henry* the Eighth, and they concluded with ſaying, that if the Court ſhall be of Opinion that the Letters Patent are good, then they find for the Defendant; but if the Court ſhall be of Opinion that the Letters Patent are void, then they find for the Plaintiff. Upon arguing the Special Verdict it was inſiſted, that, as no Title to the Premiſſes is found in the Plaintiff, he is not entitled to Judgment, even if the Court ſhall be of Opinion, that the Letters Patent are void. Judgment was given for the Plaintiff: And by the Court—As the Queſtion ſubmitted to our Conſideration is, whether the Letters Patent are void, and we are of Opinion that they are void, we will, as nothing is found to the contrary, intend, that the Plaintiff has in all other Reſpects a good Title to the Premiſſes. Cro. Car. 22. Caſtle v. Hobbs.

(F) Of a Verdict in which the Jurors did not all agree.

1. IN very antient Times it was not neceſſary in a civil Cauſe, for all the Jurors to agree in a Verdict. But it has been for many Years ſettled, that, if in a civil Cauſe the Jurors do not all agree in a Verdict, the Verdict is bad. 2 H. H. P.C. 297.

2. In an Aſſize the Juſtices took a Verdict of Eleven of the Jurors, the Twelfth not having agreed therein. The Verdict was upon great Deliberation holden to be bad; and a *Venire Facias de Novo* was awarded: And by the Court—The Juſtices ought not to have taken the Verdict, but to have carried the Jurors with them in a Cart, until they did all agree in a Verdict. 41 Aſſize 11. Bro. Verd. pl. 49.

3. The Twelfth Juror, who, inſtead of agreeing with his Fellows in the Verdict, ſaid he would rather die in Priſon than agree therein, was in the Caſe laſt cited fined and impriſoned: But he was afterwards diſcharged; and it was ſaid, that no Man ought to be puniſhed for not agreeing in a Verdict, which he does not think a right one. 41 Aſſize 11. 2 H. H. P.C. 297.

4. The Jurors are not obliged to agree in the Reaſon for finding a Verdict as it is found; and if a Reaſon be given by one or more of them, upon a Queſtion being aſked by the Judge, for finding it as it is found, this is not to be conſidered or recorded as Part of the Verdict. Vaugh. 150. Buſhel's Caſe.

(G) Of the Power of the Jury to depart from a general Verdict after it is given in open Court.

1. IF a Jury, who by Miſtake, or from Partiality, have given an improper Verdict, do of themſelves give a different Verdict before the improper Verdict is recorded; or if at the Recommendation, or by the Leave, of the 1 Inſt. 227. Plowd. 212. 2 H. H. P.C. 299, 300.

the Judge, they go together again before the improper Verdict is recorded, and do afterwards give a different Verdict, the Verdict which is last given ſhall ſtand.

Bro. Jur. pl. 7. 2. In a Writ of Conſpiracy againſt two, the Jury gave a Verdict of Guilty as to one, and of Not guilty as to the other. At the Recommendation of the Judge they went together again, to reconſider their Verdict, and afterwards gave a Verdict of Guilty as to both.

Dyer 204, 205. 3. The Title to three Acres of Land being in Iſſue, the Jury as to one of the Acres gave a Verdict for the Plaintiff, and as to another for the Defendant: But as to the third ſaid they were not agreed. By Leave of the Court they went together again, to conſider of a Verdict as to the third Acre. Afterwards, without taking any Notice of the Verdict already given, they gave a Verdict as to all the three Acres for the Plaintiff. The latter Verdict was upon great Deliberation holden to be good.

2H. H. P. C. 310. 4 It is ſaid, that, after the Jury have given a Verdict of Not guilty in an Indictment for Felony, the Judge may, if the Verdict be in his Opinion contrary to clear and full Evidence, ſend them out again to reconſider their Verdict: But it is likewiſe ſaid, that, if the Jury will ſtand to their Verdict, the Judge is bound to receive it. It is added, that the King may in ſuch a Caſe bring an Action of Attaint.

(H) In what Caſes a Verdict is bad, on Account of Miſbehaviour in one or more of the Jurors.

Bro. Enqueſt. pl. 49. 2 Roll. Abr. 714. pl. 6. pl. 7. 1. IF the Jurors, when they go from the Bar to conſider of a Verdict, do without the Leave of the Court take with them any Writing under Seal, which has been given in Evidence, they are guilty of a Miſbehaviour; but the Verdict is good.

1 Inſt. 227. Cro. Eliz. 411. 12 Mod 520. 2. It is in divers Books laid down generally, that if the Jurors, when they go from the Bar to conſider of a Verdict, do without the Leave of the Court, or the Conſent of both Parties, take with them any Writing not under Seal which has been given in Evidence, they are guilty of a Miſbehaviour: but that the Verdict is good.

Ld. Raym. 148. Rex v. Burdett. 3. The Jurors, when they went from the Bar to conſider of a Verdict, did without the Leave of the Court, or the Conſent of both Parties, take with them an Act of Common Council which had been given in Evidence. The Verdict was holden to be good; and by *Holt* Ch. J. It was a very improper Behaviour in the Jury: But as the Act of Common Council was Evidence for both Parties the Verdict ought to ſtand. In the Caſe of Lady *Joy* a Verdict was ſet aſide, becauſe the Jury did without the Leave of the Court, or the Conſent of both Parties, take with them a Map which had been given in Evidence: But the Verdict was in that Caſe ſet aſide, becauſe the Map was Evidence for only one Party, which is not the preſent Caſe.

Cro. Eliz. 189. Metcalfe v. Dean. 4. After the Jurors were gone from the Bar to conſider of a Verdict, one of the Witneſſes, who had been examined on the Part of the Defendant, was ſent for and re-examined by them; and they afterwards gave a Verdict for the Defendant. Complaint being made of this to the Judge, the Jurors confeſſed that they had re-examined the Witneſs: But they ſaid, that the Evidence upon the Re-examination was in Effect the ſame as he had given

given in Court. The Verdict was holden to be bad; and a *Venire Facias de Novo* was awarded.

5. In another Caſe the Caſe of *Metcalfe* and *Dean* is ſaid to be Law; becauſe the Evidence improperly received by the Jurors was parol Evidence; for that, as the Witneſs might vary in his Evidence upon the Re-examination from what he had given in Court, it would be of the moſt dangerous Conſequence to ſuffer ſuch Verdict to ſtand: But it is in this Caſe ſaid, that there is not ſo much Danger in letting a Verdict ſtand, where the Jurors have improperly taken with them written Evidence which has been given in Court; becauſe written Evidence remains always the ſame. Cro. Eliz. 411. Vicary v. Farthing.

6. The Plaintiff in an Aſſize delivered a Writing relative to the Matter in Iſſue to a Perſon returned upon the Pannel. This Perſon being ſworn upon the Jury, he after the Jurors were withdrawn to conſider of a Verdict, ſhewed the Writing to his Fellows. A Verdict being given for the Plaintiff, the Court was moved in Arreſt of Judgment. In Support of the Verdict it was ſaid, that as the Writing was to the ſame Effect as ſome of the Evidence given in Court, the Behaviour of the Plaintiff was not ſo bad, as if Evidence to the ſame Effect had not been given in Court. It was holden that the Verdict ſhould be ſet aſide; and by *Gaſcoigne* and *Hulls*: After the Jurors are ſworn they ought not to ſee or to carry with them any Writing, except it has been given in Evidence, and was delivered to them by Order of the Court. 11 Hen. 4, 18.

7. After the Jurors were gone from the Bar to conſider of a Verdict one of them went from his Fellows. He ſoon after returned with a Copy of a Court Roll in his Hand, and told them that the Merits, with which he was perfectly well acquainted, were with the Plaintiff. Hereupon the other Jurors, before of a different Opinion, were prevailed upon by him to give a Verdict for the Plaintiff. The Verdict was afterwards ſet aſide. 1 Sid 235. Goodman v. Coddrington.

8. Upon a Writ of Error it was aſſigned for Error, that one of the Jurors did, after they were gone from the Bar to conſider of a Verdict, ſhew to his Fellows a Writing in favour of the Plaintiff that had not been given in Evidence, by reaſon of which they found a Verdict for the Plaintiff. It was holden, that this was not Error: And by the Court—As it does not appear that the Writing was delivered to the Juror by the Plaintiff, it ſhall be intended that it was in his own Poſſeſſion, and if ſo, as he might have given the Writing in Evidence, it was lawful for him to ſhew it to his Fellows. Another Reaſon is given why this was holden not to be Error, namely, that the Fact did not appear upon the *Poſtea*; and this ſeems to be the better Reaſon: For the other, that, as the Writing might have been given in Evidence by the Juror, it was lawful for him to ſhew it to his Fellows, does not ſeem to be concluſive. Cro. Eliz. 616. Graves v. Short.

9. It is ſaid in one Book, that the Jurors are not obliged to found their Verdict entirely upon the Evidence given in Court: for that it may be in part founded upon their own perſonal Knowledge. Vaugh. 147. Buſhel's Caſe.

10. No Caſe is cited in Support of this Doctrine, and the contrary may be inferred from other Books.

11. It is in one Book ſaid, that if a Witneſs named in a Deed be returned of the Jury, it is a good Cauſe of Challenge. 1 Inſt. 157.

12. In another Book it is ſaid, that one of the Jurors, after having heard all the other Evidence, was at the Prayer of the Defendant's Counſel ſworn, and gave Evidence in Court; from whence it may be inferred, that he could not have given this Evidence to his Fellows after they were gone from the Bar. 1 Sid. 133. Fitzjames v. Moys.

13. In another Book it is ſaid, that if a Perſon returned to ſerve upon a Jury know any Thing relative to the Matter in Iſſue, it is his Duty to tell the Court ſo, that inſtead of being ſworn upon the Jury he may be examined as a Witneſs. Farr. 2. Anon.

14. It

14. It may moreover be inferred from the Practice of granting a new Trial becauſe a Verdict is contrary to Evidence, that the Jurors ought to found their Verdict intirely upon the Evidence given in Court; for if they have a Power to found it partly upon other Evidence, it would be quite unreaſonable for the Judge before whom the Cauſe was tried, who muſt always be a Stranger to what did not paſs in Court, to report, that a Verdict is contrary to Evidence, or for the Court to ſet it aſide as being ſo.

1 Inſt. 227. Bro. Verd. pl. 19. Dyer 218. 1 Ventr. 125. 12 Mod 111. 15. If a Juror eat or drink at his own Expence, before he and his Fellows have agreed in a Verdict, he is liable to be fined, but the Verdict is good.

1 Leon. 132. Mounſon v. Weſt. 16. After the Jurors had been locked up together ſome Time, the Officer who attended them, being ſurprized at their Delay in agreeing in a Verdict ſearched them, and found Figs in the Pockets of three, and Pippins in the Pockets of two others. This being repreſented to the Judge, the three, who confeſſed the having eaten of the Figs, were fined four Pounds each; and the other two, notwithſtanding they declared upon Oath that they had not eaten of the Pippins, were fined forty Shillings each: But the Verdict was upon Conference with the Judges of the other Courts holden to be good.

1 Ventr. 125. 17. In a Caſe of Neceſſity, as if a Juror be ſuddenly taken ill, it is in the Power of the Court to ſuffer him to eat and drink at his own Expence, before he and his Fellows have agreed in a Verdict.

18. If the Trial of a Cauſe be very long, it is at this Day uſual for the Court, the Conſent of both Parties being firſt obtained, to give the Jurors Leave to eat and drink during the Trial at their own Expence, or at the equal Expence of both Parties.

1 Inſt. 227. 12 Mod. 111. 19. If the Jurors eat or drink at the Expence of one Party before they have agreed in a Verdict they are liable to be fined; and if the Verdict be in Favour of that Party it is bad: But if it be in Favour of the other Party it is good.

1 Inſt. 227. 20. It is ſaid in one Book, that if the Jurors, after they have agreed in a Verdict, eat or drink at the Expence of the Party in whoſe Favour it is, the Verdict is good.

1 Ventr. 125. 21. But it is in another Book laid down, that the Jurors can never be ſaid to have agreed in a Verdict, unleſs they have by giving a Privy Verdict ſignified to the Judge, that they have agreed in one.

Bro. Verd. pl. 57. Moor 33. 22. It is ſaid in two Books, that although the Jurors have given a Privy Verdict, they muſt not eat or drink without Leave of the Court, until they have given a Verdict in open Court.

Bro. Verd. pl. 57. 23. And it is in one of theſe ſaid, that although the Jurors may with Leave of the Court eat and drink after they have given a Privy Verdict, they muſt be kept together, until they have given a Verdict in open Court.

1 Barn. 225. Ld. St. John v. Abbot. 24. The Jurors having received their Charge withdrew to conſider of a Verdict. Before the riſing of the Court they came into Court to aſk a Queſtion of the Judge, which being anſwered they again withdrew. At the Sitting of the Court in the Afternoon of the ſame Day the Judge was informed, that two or three of the Jurors were in Court. Being aſked by the Judge what they did there, and having anſwered that they and their Fellows could not agree in a Verdict, they were ordered to go to their Fellows. A Verdict was afterwards given for the Plaintiff, and the Judge did not report that it was contrary to the Evidence. The Court being moved that this Verdict might be ſet aſide, it was holden to be good: And by the Court—Some of the Jurors have been guilty of a great Miſbehaviour, and are liable to be fined: But, as the Plaintiff has not been guilty of any Miſbehaviour, the Verdict ought to ſtand.

25. The

25. The Jurors being equally divided in Opinion threw Dice for whom they ſhould find a Privy Verdict, and did find one for the Party in whoſe Favour the Dice came: And without conferring afterwards together they gave a Verdict for the ſame Party in open Court. The Verdict was ſet aſide: And by the Court—As our Eſtates, Liberties and Lives, are in the Power of Jurors, they ought to be very circumſpect in their Conduct. In this Caſe the Jurors, have behaved very improperly; for they were determined by Chance in the finding of their Privy Verdict, and they had not any Conference together afterwards, before they gave their Verdict in open Court. 1 Freem. 415. Ld. Fitzwalter's Caſe.

26. The Jurors who could not agree in a Verdict, drew Lots for whom they ſhould find one, and did find one for the Party in whoſe Favour the Lot was. The Verdict was ſet aſide; and the Jurors were ordered to appear in Court. 2 Lev. 205. Foſter v. Hawden.

27. Another Verdict was for the ſame Reaſon ſet aſide, notwithſtanding the Judge reported, that the Party, in whoſe Favour it was, ought in his Opinion to have a Verdict. Str. 642. Hale v. Cove.

28. A Verdict was ſet aſide, becauſe the Jurors were determined as to the Damages they ſhould give by throwing up Croſs or Pile, whether they ſhould give five Hundred Pounds or three Hundred. Bunb. 51. Melliſh v. Arnold.

29. If the Jurors who cannot agree in a Verdict vote, and give a Verdict according to the greater Number of Votes, the Verdict is nevertheleſs good. Comb. 14. Anon.

30. In a modern Caſe wherein the Jurors voted for a Verdict, ſeven of them were for finding a Verdict as it was found, and no Objection was made by the other five when the Verdict was given. The Court refuſed to ſet aſide the Verdict: And by *Lee* Ch. J.—Nothing was in this Caſe determined by Chance. The five Jurors might ultimately be convinced by the ſeven: But if they only acquieſced in the finding of the Verdict that is ſufficient; and they ſhall not now be received to ſay that they did not acquieſce. Sayer 100. Lawrence v. Boſwell.

31. A Verdict was ſet aſide upon an Affidavit of Eleven of the Jurors, that they and the other Juror had agreed to give a Verdict for the Plaintiff; but that the Foreman had given a Verdict for the Defendant. Ca. of Pr. in C. B. 66. Miles v. Baker.

32. It is ſaid, that a Miſbehaviour in one or more of the Jurors cannot be aſſigned for Error, unleſs the Miſbehaviour appear upon the *Poſtea* if the Cauſe were tried at *Niſi Prius*, or upon the Record if it were tried at Bar; for that, if a Miſbehaviour not appearing on Record could be taken Advantage of by Writ of Error, a Verdict might at a great Diſtance of Time be ſet aſide, when by Reaſon of the Death of one of the Parties, or of one or more of the Jurors, the Truth of the Miſbehaviour ſuggeſted could not be properly inquired into. Cro. Eliz. 616. Grave v. Short.

33. It is laid down in two Caſes, that the Court will not ſet aſide a Verdict for Miſbehaviour in one or more of the Jurors, unleſs the Miſbehaviour appear upon the *Poſtea* if the Cauſe were tried at *Niſi Prius*, or upon the Record if it were tried at Bar. Cro. Eliz. 189. Medcalf v. Dean, Trin. 32 Eliz. Cro. Eliz. 411. Vacary v. Farthing. Mich. 37 Eliz.

34. But the Court did in one ſubſequent Caſe ſet aſide the Verdict, upon an Affidavit that the Jurors did eat at the Expence of the Party in whoſe Favour it was given, before they had agreed in the Verdict. 1 Freem. 79. Bellamy v. Player, Paſch. 23 Car. 2.

35. In another ſubſequent Caſe the Court ſet aſide a Verdict, upon an Affidavit of the Officer who attended the Jurors, that they had toſſed up Croſs and Pile for whom they ſhould find the Verdict, and had found one accordingly. 2 Jon. 83. Fry v. Hardy. Mich 29. Car. 2.

(I) In what Caſes a Verdict is bad, on Account of a Misbehaviour in one of the Parties.

1 Ventr. 125. Duke of Richmond v. Wiſe. 2 Roll. Abr. 716. pl. 17.

1. IF one of the Parties ſpeak Words of meer Civility to one of the Jurors, before they have agreed in a Verdict, the Verdict although it be in Favour of ſuch Party, is good.

1 Ventr. 125. Duke of Richmond v. Wiſe. 2 Roll. Abr. 716. pl. 17.

2. If one of the Parties ſay theſe Words to one of the Jurors, before they have agreed in a Verdict, *the Matter is clearly of my Side*, or theſe Words, *I hope you will find for me*, the Verdict if it be in Favour of ſuch Party is bad: But if it be in Favour of the other Party it is good.

1 Inſt. 227.

3. If one of the Parties or his Agent deliver to the Jurors, before they have agreed in a Verdict, a Writing relative to the Matter in Iſſue which was not given in Evidence, the Verdict if it be in Favour of ſuch Party is bad: But if it be in Favour of the other Party it is good.

Ibid.

4. If one of the Parties or his Agent without Leave of the Court deliver to the Jurors, before they have agreed in a Verdict, a Writing ſealed or not ſealed which was given in Evidence, the Verdict if it be in Favour of ſuch Party is bad: But if it be in Favour of the other Party it is good.

2 Roll. Abr. 714. pl. 6.

5. And it is ſaid, that the Verdict if it be in Favour of the Party who delivered the Writing is bad, notwithſtanding the Jurors do afterwards declare upon Oath, that they never read the Writing; for that it would be of the moſt dangerous Conſequence, if the Jurors ſhould be ſuffered to receive a Writing privately from one of the Parties.

Cro. Eliz. 411. Vicary v. Farthing.

6. After the Jurors were gone from the Bar, but before they had agreed in a Verdict, the Plaintiff's Attorney delivered to them a Book which had been given in Evidence. A Verdict being afterwards found for the Plaintiff, *Fenner* J. was upon a Motion to ſet it aſide of Opinion, that, as the Verdict was in Favour of the Party in Behalf of whom the Book was delivered, it was bad. The Reporter adds that the Cauſe was adjourned; and that there was afterwards Judgment for the Plaintiff.

Moor. 452.

7. In another Report of the ſame Caſe it is ſaid, that *Clinch* J. as well as *Fenner* J. was of Opinion that the Verdict was bad; and if ſo, notwithſtanding the Plaintiff had Judgment, which followed of Courſe as the Court was equally divided, this Caſe does not contradict what is laid down in the Books above cited.

(K) Of a Verdict upon an informal or immaterial Iſſue.

1. IF an Iſſue be joined upon a Point ſo material, that the Determination thereof will determine the Matter in Queſtion, but be not joined properly, this is an Informal Iſſue.

2. An

2. An Iſſue, which would have been bad upon a Demurrer by Reaſon of Informality, is after a Verdict helped by the 32 *H.* 8. *c.* 30. The miſjoining of Iſſue being one of the Things mentioned in that Statute.

3. In an Action of Prohibition to a Suit for Tithes the Plaintiff alledged a Preſcription, for all the Pariſhioners to clip the Wool from the Necks of their Sheep in order to preſerve them, and that, in Conſideration of paying the Tenth Fleece when the Sheep ſhould be ſheared, they had been uſed to be diſcharged of the Tithe of the Wool ſo clipped from the Necks of their Sheep. The Defendant traverſed the Preſcription in this Manner, *abſque hoc* that, in Conſideration of paying the Tenth Fleece when their Sheep ſhould be ſheared, they had been uſed to be diſcharged of the Tithe of the Wool ſo clipped from the Necks of their Sheep. Iſſue being joined upon the Traverſe, and a Verdict being found for the Defendant, the Court was moved, that a Conſultation ought not to be awarded, becauſe the Iſſue is not well joined. A Conſultation was awarded: And by the Court—Although the Iſſue be not aptly joined, it is after a Verdict helped by the Statute. Cro. Ja. 576. Jouce *v.* Parker.

4. In an Action of Replevin the Defendant avowed the Taking as a Diſtreſs for Rent in Arrear, which he claimed under a Grant of Rent-charge from *J. N.* the Heir of *E. N.* who was ſeiſed in Fee of the Land. The Plaintiff replied, that *E. N.* was ſeiſed of an Eſtate Tail, and that upon her Death *J N.* her Son became intitled to the Land, and that upon his Death it deſcended upon the Plaintiff; and he traverſed the Seiſin of *E. N.* in Fee. Iſſue being joined upon the Traverſe, and a Verdict being found for the Defendant, it was ſaid upon a Motion in Arreſt of Judgment, that the Iſſue is immaterial; for that, as it is not material how the Anceſtor of the Grantor of the Rent-charge was ſeized, but how the Grantor was himſelf ſeiſed, the Traverſe ought to have been upon the Seiſin in Fee of the Grantor. Judgment was given for the Defendant: And by the Court—As the Defendant has alledged a Seiſin in Fee in *E. N.* her Seiſin in Fee is material and conſequently was traverſable; ſo that, although this be not ſo apt an Iſſue as might have been joined, it is after a Verdict helped by the Statute. Cro. Ja. 44. Pigot *v.* Pigot.

5. In an Action of *Aſſumpſit* the Defendant pleaded Not guilty. Iſſue being joined upon the Plea, a Verdict was found for the Plaintiff. Upon a Motion in Arreſt of Judgment it was ſaid, that the Iſſue is immaterial; but Judgment was given for the Plaintiff: And by the Court—Although this be not the moſt proper Iſſue, and would have been bad upon a Demurrer; yet, as Deceit is charged in the Declaration in an Action of *Aſſumpſit*, the Plea of Not guilty is ſuch an Anſwer thereto, that the Iſſue joined upon it is after a Verdict helped by the Statute. *Walmſley* J. added—That there are many Precedents, in which an Iſſue joined in an Action of *Aſſumpſit* upon the Plea of Not guilty has been tried, and Judgment has been given. Cro. Eliz. 470. Corbyn *v.* Brown.

6. If an Iſſue be joined upon a Point ſo immaterial that the Determination thereof will not determine the Matter in Queſtion, this is an immaterial Iſſue.

7. An immaterial Iſſue is not helped by any of the Statutes of Jeofails. Carth. 371. 1 Lev. 32.

8. In an Action of Treſpaſs the Defendant pleaded an Accord betwixt *J S.* and the Plaintiff of the one Part and himſelf of the other. The Plaintiff replied, that no Accord was made betwixt the Defendant and him. Iſſue being joined upon this Replication, and a Verdict being found for the Plaintiff, it was holden, that no Judgment could be given by Reaſon of the Immateriality of the Iſſue; it not being joined upon the Accord pleaded by the Defendant but upon a different Accord. 1 Roll. Rep. 86. Carpenter *v.* Starr.

Cro. Ja. 5. Coxe v. Croſwell.

9. In an Action of Trover againſt Huſband and Wife, which charged a Converſion by the Wife, both the Defendants pleaded Not guilty. Iſſue being joined upon the Plea, and a general Verdict being found for the Plaintiff, a Repleader was awarded: And by the Court—If Judgment ſhould be given for the Plaintiff, it would amount to ſaying, that the Huſband and Wife were both guilty of the Converſion; whereas the Plaintiff does only charge that the Wife was guilty thereof.

Ca. of Pr. in C. B. Noble v. Lancaſter. 1 Barn. 321. S. C.

10. In an Action of Trover the Defendant pleaded *Non Aſſumpſit*. Iſſue being joined upon the Plea, and a Verdict found for the Plaintiff, a Repleader was awarded on Account of the Immaterialty of the Iſſue.

2 Str. 973. Cory v. Hinton.

11. In an Action of Treſpaſs *Quare Clauſum fregit* the Defendant pleaded, that the Place in which the Treſpaſs is charged is his Land. The Plaintiff replied, that the Place in which the Treſpaſs is charged is his Land, and not the Land of the Defendant. Iſſue being joined upon the Replication, a Verdict was found for the Plaintiff. Upon a Motion in Arreſt of Judgment it was ſaid, that the Iſſue is immaterial; for that the Place in which the Treſpaſs is charged may be the Eſtate of the Plaintiff, and yet he may not be in the Poſſeſſion thereof, which he muſt be in order to maintain this Action. The Plaintiff had Judgment: And by the Court—It is found, that the Place in which the Treſpaſs is charged is the Land of the Plaintiff; and we will after a Verdict rather intend that he was in the Poſſeſſion thereof than that he was not.

5 Rep. 43. Nichol's Caſe. Moor 692. S. C.

12. In an Action of Debt upon a ſingle Bill the Defendant pleaded Payment of the Money due thereupon; but did not plead an Acquittance. Iſſue being joined upon the Plea, a Verdict was found for the Plaintiff, and Judgment was given for him. A Writ of Error being brought in the Exchequer Chamber, it was aſſigned for Error, that, as the Payment of the Money due upon a ſingle Bill is no Diſcharge of the Bill, unleſs there be an Acquittance, the Iſſue is immaterial. The Judgment was affirmed: And by the Court—If the Verdict had been for the Defendant, it would perhaps have been bad, becauſe an Acquittance could not upon this Iſſue have been found: But, as the Verdict finds that the Money due upon the Bill is not paid, it does virtually find that the Bill is not diſcharged; and the Court will never ſuffer a Defendant to avail himſelf of his own bad Pleading, in order to deprive a Plaintiff of the Benefit of a Verdict, upon which Judgment may be well given.

Cro. Ja. 678. Johns v. Ridler.

13. In an Action of *Ejectione firmæ* the Defendant pleaded, that *J. S.* being ſeiſed in Fee of the Premiſſes, demiſed them to him for the Term of five Years; that by Virtue of this Demiſe the Defendant entered, and was poſſeſſed, until the Plaintiff's Leſſor diſſeiſed him; that the Plaintiff's Leſſor being ſeiſed of the Premiſſes by the Diſſeiſin demiſed the ſame to the Plaintiff; and that the Defendant entered upon the Plaintiff, as it was lawful for him to do, the Plaintiff replied that his Leſſor was ſeiſed in Fee, and traverſed the Diſcuſſion of the Defendant. Iſſue being joined upon the Replication, a Verdict was found for the Plaintiff. Upon a Motion in Arreſt of Judgment it was ſaid, that, as the Defendant was by his own ſhewing only a Termor, he could not be diſſeiſed, and conſequently that, the Iſſue being immaterial, no Judgment could be given upon the Verdict. Judgment was given for the Plaintiff: And by the Court—If a Verdict had been found for the Defendant, it would have been bad; becauſe it would have found a Diſſeiſin of a Termor: But, as the Verdict is for the Plaintiff, Judgment may be well given; becauſe it only finds that his Leſſor did not diſſeiſe the Defendant; and the Court will never ſuffer one Party, if conſiſtently with the Rules of Law it can be prevented, to avail himſelf

of

of his own bad Pleading, in order to deprive the other of the Benefit of a Verdict.

14. In an Action of Replevin the Defendant avowed the taking as a Diſtreſs for an Arrear of Rent, due to him under a Demiſe from the Plaintiff made at *A.* dated 1 *Nov.* 18 *Car.* 2. The Plaintiff replied, that he did not make a Demiſe to the Defendant at *A.* dated 1 *Nov.* 18. *Car.* 2. in Manner and Form as alledged. Iſſue being joined upon the Replication, the Jury found a Verdict for the Plaintiff, and Judgment was given for him. A Writ of Error being brought, it was aſſigned for Error, that the Iſſue is immaterial: Becauſe it only is, whether a Demiſe was made by the Plaintiff to the Defendant at a Place certain, and upon a Day certain, whereas a Demiſe at any other Place, and upon any other Day, would have been ſufficient to have warranted the Diſtreſs of the Defendant. It was moreover ſaid, that as the Merits, namely, whether there was a ſufficient Demiſe to warrant the Diſtreſs, had not been tried, and as the Trial thereof had been prevented by the bad Pleading of the Plaintiff, who has by the Replication made the Place and Day of the Demiſe material, neither of which is in ſuch Caſe material, he ought not to have Judgment. On the other Side it was ſaid, that this is at moſt only a Misjoining of Iſſue, which is after a Verdict helped by the Statute of Jeofails. 2 Lev. 11. Holbeck *v.* Bennet. 2 Saund. 317. S. C.

15. The Opinion of the Court was, that this Caſe is not within the Statute of Jeofails; and that, as the Merits have not been tried, the Plaintiff is not intitled to Judgment upon the Verdict: But, as it appeared, that the Avowry of the Defendant is bad, it was holden the Plaintiff is intitled to Judgment upon the Declaration which is good; and the Judgment was affirmed.

(L) Of a Verdict upon an Iſſue, Part of which is inſenſible or inſufficient.

1. IF Part of an Iſſue be inſenſible, the Verdict thereupon found, notwithſtanding it be a general one, is good; for the Court will not intend, that Part of the Damages was given for the inſenſible Part. On the contrary the Court will in Support of the Verdict intend, that no Damages were given for that Part. Carth. 131. Nightingale *v.* Bridges. Salk. 364.

2. In an Action of *Aſſumpſit* the Plaintiff declared upon the Cuſtom of Merchants, for Money due upon a Promiſſory Note; and he likewiſe declared upon an *Indebitatus Aſſumpſit*. Iſſue was joined upon the Plea of *Non Aſſumpſit*, and a General Verdict was found for the Plaintiff. It being upon a Motion in Arreſt of Judgment holden, that a Promiſſory Note is not within the Cuſtom of Merchants, it was inſiſted, that the Court may after a Verdict intend, that no Damages were given on Account of the Note. The Judgment was arreſted: And by the Court—As the Note is not a Matter inſenſible, but a Matter inſufficient in Law, the Court muſt intend that Part of the Damages was given on Account thereof, and if it was given the Verdict is bad. Salk. 129, 364. Clark *v.* Martin.

(M) Of

(M) Of a Verdict which does not find all that is in Issue.

1 Inst. 227. 1. IF a Verdict do only find Part of what is in Issue, it is bad; because the Jury have failed in their Duty, which was to find all that is in Issue.

Ibid. 2. In an Information for intruding into a Messuage and a hundred Acres of Land, Issue was joined upon the Plea of Not guilty; the Jurors found for the Plaintiff as to the Land, but were silent as to the Messuage. The Verdict was holden to be bad.

Cro. Eliz. 133. Finnymore v. Stanley. 3. In an Action of Debt the Plaintiff declared for seven Pounds. The Defendant pleaded *Nil Debet*, and Issue was joined upon the Plea. The Jury found that the Defendant owed the Plaintiff six Pounds, but were silent as to the seventh Pound. The Verdict was upon a Writ of Error holden to be bad.

3 Leon. 82. Rosse's Case. 4. In an Action of Trespass the Plaintiff declared for the breaking of his Close, for the beating of his Servant, and for the carrying away of his Goods. The Defendant pleaded Not guilty, and Issue was joined upon the Plea The Jury found the Defendant guilty of breaking the Close, but were silent as to the beating of the Servant and the carrying away of the Goods. The Verdict was holden upon a Motion in Arrest of Judgment to be bad; because it does not find all that is in the Issue, and a *Venire Facias de Novo* was awarded.

Hardr. 166. Rochel and his Wife v. Steedle. 5. The Declaration in an Action of Trespass brought by *Baron* and *Feme* charged the Beating of both. The Defendant pleaded Not guilty, and Issue was joined upon the Plea. The Jury found the Defendant guilty of beating the *Feme*, but were silent as to the Beating of the *Baron*. Upon a Motion in Arrest of Judgment the Verdict was holden to be bad, because it does not find all that is in Issue, and a *Venire Facias de Novo* was awarded.

Sayer 36. Rex v. Simmons 6. If in an Indictment for privately conveying Duckets into the Prosecutor's Pocket, with an Intent to charge him with a Robbery, the Jury find the Defendant guilty of the Fact, but are silent as to the Intent; no Judgment can be given, the Verdict being incompleat.

Str. 1089. Hooper v. Shepherd. 7. In an Action of Debt upon a Charter-Party, by which the Defendant had contracted to pay fifty Guineas a Month for the Use of a Ship, the Plaintiff alledged, that five Hundred Pounds were due to him for the Use of the Ship for a Time therein mentioned. The Defendant pleaded, that he had paid the Plaintiff, at the Rate of fifty Guineas a Month, for all the Time he had had the Use of the Ship. Issue being joined upon the Plea, the Jury found, that three Hundred Pounds were due to the Plaintiff for the Use of the Ship; but were silent as to the Residue of the five Hundred Pounds. Upon a Writ of Error it was assigned for Error, that the Verdict does not find all that is in Issue. In Support of the Verdict it was said, that, as the Issue is Special, and the Jury have ascertained what is upon the whole due to the Plaintiff for the Use of the Ship, no other Action can be brought for the Use thereof, for any Part of the Time mentioned in the Declaration. The Judgment was reversed: And by the Court—There is no Difference, as to the Question before the Court, betwixt the Case of a Verdict upon a Special Issue and that of a Verdict upon a general Issue; for the Jury must in either Case find all that is in Issue.

Salk. 133. Hillv. Lewis. 1 Ventr. 27. 12 Mod. 5. 8. If there are several Counts in a Declaration, and the Verdict be taken upon only one of the Counts it is good, provided all that is in Issue

Iſſue upon that Count be found; becauſe every Count is to be conſidered as a diſtinct Declaration.

9. If a Verdict find all that is in Iſſue in one Count which is material, it is good; for, if any Thing not material be put in Iſſue, the Verdict is good, notwithſtanding it be ſilent as to that. 1 Inſt. 227

10. In an Action of Debt, for the Penalty given for not having ſet out Tithes, the Plaintiff declared upon a Leaſe from *J. S.* of the Tithes of the Pariſh of *A.* for the Term of ſix Years, in Caſe *J. S.* ſhould ſo long live, *and continue to be Parſon of the Pariſh of A.* The Defendant pleaded *Nil Debet*, and Iſſue was joined upon the Plea. The Jury found a Leaſe from *J. S.* of the Tithes of the Pariſh of *A.* for the Term of ſix Years in Caſe *J. S.* ſhould ſo long live; but they found likewiſe, that the Words, *and continue to be Parſon of the Pariſh of A.* were not contained in the Leaſe. *Haughton* J. was of Opinion, that the Plaintiff ought not to have Judgment: But the other Juſtices were of a different Opinion; and by them. The Leaſe found is in Subſtance the ſame as that which is in Iſſue; for although the Words, *and continue to be Parſon of the Pariſh of A.* are not contained in the Leaſe, they are implied therein. It was moreover ſaid, that the Leaſe is only Matter of Inducement, the not having ſet out the Tithes being the Giſt of the Action; for which Reaſon, as enough is found to ſhew that the Tithes were not ſet out, and that the Plaintiff had a Right thereto, he ought to have Judgment. Cro Ja. 328. Wheeler *v.* Haydon.

11. In an Indictment which contained three Counts, the firſt Count charged the forging of a certain Bond; the ſecond charged the publiſhing of the forged Bond by the Defendant; the third charged the publiſhing of a Bond knowing it to have been forged. The Jury found, that it was proved, that the Defendant did forge the Bond ſet out in the Indictment, and that he did publiſh the ſame; and then, without ſaying any Thing as to the Fact charged in the third Count, they concluded with ſaying, that if upon this Evidence the Court ſhall be of Opinion that the Defendant is guilty of the Fact charged, then they find him guilty; but if the Court ſhall be of Opinion that he is Not guilty thereof, then they find him Not guilty. It was ſaid for the Defendant, that this Verdict is bad; becauſe it does not find all that is in Iſſue. It was holden, that the Court is not in this Caſe bound by the Concluſion of the Jury: But that, upon what is found to have been proved, it is the Duty of the Court, to adjudge the Defendant guilty of the forging and the Publication charged in the two firſt Counts, and Not guilty as to the Reſidue; and Judgment was given accordingly. Str. 844, 845. Rex *v.* Hayes.

12. It is ſaid, that the Court will never award a *Venire Facias de Novo* in an Indictment for a Capital Offence; although a material Fact be not found by the Verdict. It is likewiſe ſaid, that, if the Facts found be not ſufficient to warrant a Judgment againſt the Defendant in an Indictment for a Capital Offence, the Court will, provided the Verdict be ſufficient to found a Judgment upon, give Judgment for him; for that no Man's Life ought to be twice in Jeopardy for the ſame Offence. Str. 877. Rex *v.* Huggins.

(N) Of a Verdict which finds a Thing that is not in Iſſue.

1. A Verdict is not bad, on Account of its finding a Thing that is not in Iſſue, it being a Maxim, that *Utile per inutile non vitiatur*, and the Court will, in giving Judgment, reject that Part of the Verdict which 1 Inſt. 227

which relates to the Thing not in Iſſue as Surpluſage; in as much as the Jury had nothing to do therewith.

6 Rep. 57. Dowdale's Caſe. Cro. Ja. 55. 2. If the Matter in Iſſue be whether there are Aſſets, and the Jury find that there are Aſſets *beyond the Seas*, the Verdict is nevertheleſs good; for the Court will, in giving Judgment, reject the Words *beyond the Seas* as Surpluſage.

Bro. Nugat. pl. 25. Bro. Verd. pl. 68. 3. If the Matter in Iſſue be, whether *J. S.* died ſeiſed of certain Premiſſes, and the Jury, after finding that he did die ſeiſed thereof, find that *continual Claim* has ſince the Death of *J. S.* been made by *J. N.* the Verdict is nevertheleſs good; for the Court, in giving Judgment, will not pay any Regard to what is found concerning the *continual Claim*.

Cro. Ja. 407. Sidenham *v.* Man. 2 Roll. Abr. 717. pl. 4. 4. If in an Action upon the Caſe for Words the Jury, after finding that the Defendant ſpoke the Words in Iſſue, find that he ſpoke *other ſlanderous Words*, the Verdict is nevertheleſs good; for the Court will, in giving Judgment, reject the finding of the *other ſlanderous Words* as Surpluſage.

Hob. 52, 54. Foſter *v.* Jackſon. 5. In an Action of *Scire Facias* againſt the Executor of *J. S.* the Matter in Iſſue was, whether *J. S.* had been taken in Execution by Virtue of a *Capias ad Satisfaciendum* ſet out in the Declaration, which iſſued upon a Judgment obtained by the Plaintiff againſt *J. S.* The Jury found, that *J. S.* was not taken in Execution by Virtue of the *Capias ad Satisfaciendum* ſet out in the Declaration, but that he was taken in Execution by Virtue of an *Alias Capias Satisfaciendum* which iſſued upon the Judgment. This was holden to be a Verdict for the Plaintiff: And by the Court—As it is found that *J. S.* was taken in Execution by Virtue of a *Capias ad Satisfaciendum* which iſſued upon Judgment, the Word *Alias*, which only ſhews the particular Species of *Capias ad Satisfaciendum*, ought to be rejected as Surpluſage.

Cro. Car. 219. Taylor *v.* Willes. 6. In an Action of *Aſſumpſit* the Jury found a Verdict for the Plaintiff, and, after aſſeſſing Damages to the amount of thirty Pounds, added the following Words, *the Damages to be paid in dying if by Law they may be ſo paid.* Theſe Words being omitted in the Judgment a Writ of Error was brought, and the Omiſſion was aſſigned for Error. The Judgment was affirmed: And by the Court—As the Verdict, which finds for the Plaintiff and aſſeſſes Damages, is a complete Verdict, what is added *as to the Manner of paying the Damages* is nugatory, and being ſo it is very properly omitted in the Judgment.

2 Saund. 308. Rex *v.* Urlyn. 7. After an Indictment found at an Aſſize had been moved by *Certiorari* into the King's Bench, the Defendant pleaded Not guilty, and Iſſue was joined upon the Plea by the King's Coroner. The Jury found the Defendant guilty of the Premiſſes, *prout* the *Coroner has complained againſt him.* Upon a Motion in Arreſt of Judgment it was ſaid, that the Verdict is bad, becauſe, as the Indictment was found at an Aſſize, *the Coroner has not complained againſt the Defendant*; and that the Fault is not cured by any of the Statutes of Jeofails. The Verdict was holden to be good: And by the Court—The Verdict, which finds the Defendant guilty of the Premiſſes, is compleat, and conſequently, as that which follows *concerning the Complaint of the Coroner* ought to be rejected as Surpluſage, it will not want the Help of any of the Statutes of Jeofails.

Dyer 372. Heyward's Caſe. 8. Upon an Iſſue directed out of the Court of Chancery the Jury found a Verdict in the following Words. Our Verdict is, that the Defendant did not aſſume to the Plaintiff in Manner and Form as in the Record is ſuppoſed: But notwithſtanding this, if the two Witneſſes *J. S.* and *J. N.* have teſtified the Truth, as we think they have, then we find, that the Defendant did aſſume to reaſſure to the Plaintiff ſo much of the Land mentioned in the Record as the Defendant had bought of the Plaintiff, upon the Payment of two Hundred and fifty Pounds by the Plaintiff to the Defendant within three Years after the Aſſumption; and if the Court ſhall think

think ſo we find for the Plaintiff, and aſſeſs Damages to the Amount of twenty Pounds, and Coſts to the Amount of four Pounds. The Verdict was decreed by the Chancellor to be a Verdict for the Defendant; and *Dyer* J. and *Ayloffe* J. whom he called to his Aſſiſtance, and the Counſel for both Parties, were ſatisfied with the Decree.

9. If a Verdict, after finding the Matter in Iſſue, find a Thing which might have been pleaded in Abatement, as *Joint-tenancy*, the Verdict is good; for, as the Defendant did not avail himſelf of the *Joint-tenancy*, by pleading it in Abatement, the Court will reject it as Surpluſage. Bro. Nugat. pl. 27.

10. In an Action of Waſte the Plaintiff declared, that the Defendant, being ſeized in Fee of the Premiſſes on which the Waſte was committed, had enfeoffed *J. S.* to the Uſe of the Defendant for Life with Remainder to the Plaintiff in Fee. The Defendant pleaded, that the Feoffment was to the Uſe of himſelf in Fee, *abſque hoc* that it was to the Uſe of himſelf for Life with Remainder to the Plaintiff in Fee. Iſſue being joined upon the Plea the Jury found, that the Feoffment was to the Uſes mentioned by the Plaintiff: but they found further, that the Eſtate for Life reſerved to the Defendant *was without Impeachment of Waſte*; and ſubmitted it to the Court whether the Plaintiff ought to have Judgment. *Wyndham* J. was of Opinion, that the Plaintiff ought not to have Judgment; in as much as it appeareth from what is found by the Verdict, that he had no Cauſe of Action. But *Anderſon* Ch. J. *Rhodes* J. and *Periam* J. were of Opinion, that the Plaintiff ought to have Judgment; and by *Anderſon* Ch. J. the Matter in Iſſue is found for the Plaintiff; and as the Defendant did not avail himſelf *of the Privilege of being diſpuniſhable of Waſte*, by pleading it, the Jury, it not being in Iſſue, had nothing to do therewith; for which Reaſon that which is found concerning it ought to be rejected as Surpluſage. 3 Leon. 80. Pepy's Caſe.

11. In an Action of *Aſſumpſit* againſt an Executor the Plaintiff declared upon a Promiſe of the Defendant's Teſtator. Iſſue being joined upon the Plea of *Non Aſſumpſit* the Jury found for the Plaintiff: But they likewiſe found, *that the Teſtator was dead before the Day on which the Promiſe is alledged to have been made.* The Verdict was holden to be good: And by the Court—As the Jury have found for the Plaintiff, their finding, *that the Teſtator was dead before the Day on which the Promiſe is alledged to have been made*, ought to be rejected as Surpluſage. Cro. Car. 130. Inkerſalls v. Sams.

(O) Of a Verdict which varies from the Iſſue.

1. A Verdict which varies from the Iſſue in a Matter of Subſtance is bad.

2. What is ſuch a Variance betwixt a Verdict and the Iſſue, as will make the Verdict bad is beſt to be learned from conſidering the Determinations upon the Point, the Principal of which in divers Actions ſhall be mentioned.

1. In an Action of *Aſſumpſit*.

3. The Plaintiff in an Action of *Aſſumpſit* declared upon a Contract by two Perſons. Iſſue being joined upon the Plea of *Non Aſſumpſit*, the Jury found, that the Contract was made by only one of the Perſons. This was holden to be a Verdict for the Defendant; the Contract found being different from that which is in Iſſue. 2 Roll. Abr. 707. pl. 49.

4. The

2 Ventr. 151. Bland v. Haſelrig and others.

4. The Plaintiff in an Action of *Aſſumpſit* declared upon a Promiſe by four Perſons. The Defendants all joined in the Plea of *Non Aſſumpſit infra ſex Annos*, and Iſſue was thereupon joined. The Jury found, that one of the Defendants had promiſed within ſix Years; but they likewiſe found, that the other three had not. It was holden, that, as the Jury have not found the Promiſe which is in Iſſue, the Verdict is for the Defendants.

Carth. 196. Beake v. Kent.

5. In an Action of *Aſſumpſit* the Defendant an Adminiſtrator pleaded, that three Judgments had been obtained againſt him as Adminiſtrator to *J. S.* that thoſe Judgments are ſtill in Force, and that he has Aſſets in his Hands only to the Value of five Shillings which are liable to thoſe Judgments. The Plaintiff replied, that thoſe Judgments are kept in Force by Fraud, and Iſſue was joined upon the Replication. The Jury found, that one of thoſe Judgments was kept in Force by Fraud. The Verdict was holden to be for the Plaintiff: And by the Court—As the Defendant's Plea is found to be falſe as to Part, the Plaintiff ought to have Judgment.

2 Roll. Abr. 719. pl. 18.

6. In an Action of *Aſſumpſit* the Plaintiff declared, that the Defendant was indebted to him in the Sum of twenty Pounds, which he promiſed to pay upon Requeſt. The Defendant having pleaded *Non Aſſumpſit*, the Jury found, that the Defendant was indebted to the Plaintiff in the Sum of ten Pounds upon one Account, and in the Sum of ten Pounds upon another. The Verdict was holden to be bad; becauſe, as the Iſſue is joined upon one Promiſe and the Jury have found two Promiſes, the Variance is in a Matter of Subſtance.

Brownl. 13. Gore v. Colethorpe.

7. In an Action of *Aſſumpſit* it was alledged in the Declaration, that the Defendant, in Conſideration that the Plaintiff would give Credit for certain Goods to *J. S.* promiſed to pay for the ſame, when he ſhould, after the Delivery of any Goods, be requeſted ſo to do. The Defendant pleaded *Non Aſſumpſit*, and Iſſue was joined upon the Plea. The Jury found, that the Defendant did promiſe to pay for the Goods, but they did not find, that a Requeſt of Payment had been made to him after the Delivery of the Goods. The Verdict was holden to be bad: And by the Court—As the Duty could not in this Caſe ariſe until a Requeſt was made, the Requeſt is material and conſequently, as this is not found the Verdict is bad.

Cro. Eliz. 292. Bagnal v. Sacheverel.

8. It has been heretofore holden, that if the Plaintiff in an Action of *Aſſumpſit* declare upon an *Indebitatus Aſſumpſit*, he cannot recover a leſſer Sum than he declares for. In an Action of *Aſſumpſit* the Plaintiff declared, that the Defendant was indebted to him in the Sum of fifty Pounds, which he promiſed to pay. The Jury found, that as to forty ſeven Pounds, Parcel of the ſaid fifty Pounds, the Defendant had promiſed to pay it, but they likewiſe found, that as to the Reſidue he had not promiſed to pay it. The Verdict was holden to be for the Defendant; becauſe the Promiſe found is different from that which is in Iſſue.

9. But however it may have been heretofore holden, it is at this Day certain, that the Plaintiff in an Action of *Aſſumpſit* may recover a leſſer Sum than he has declared for, notwithſtanding he have declared upon an *Indebitatus Aſſumpſit*.

MS. Rep. Thompſon v. Spencer, Eaſt. 8 G. 3. in K. B.

10. And it was in a very late Caſe holden, that, although the Plaintiff in an Action of *Aſſumpſit* have declared upon an *Inſimul Computaſſent*, he may recover Damages to a leſſer Amount, that the Ballance alledged to be due; and by *Yates* J. as the Promiſe upon which an Action of *Aſſumpſit* is founded cannot extend further than to what is juſtly due, the Jury, in aſſeſſing Damages, have a Power to divide the Damages alledged, in ſuch Manner that the Plaintiff may recover what is juſtly due.

2. In an Action upon the Case.

11. In an Action upon the Case the Plaintiff declared, that the Defendant, of whom he had bought two Oxen, warranted them to be sound, and he alledged that they were unsound. The Defendant pleaded Not guilty, and Issue was joined upon the Plea. The Jury found the Defendant guilty as to one of the Oxen, and Not guilty as to the other. Upon a Motion in Arrest of Judgment it was insisted, that, as the Issue is whether the two Oxen warranted to be sound were unsound, and the Verdict finds that only one of them was unsound, the Plaintiff ought not to have Judgment. Judgment was given for the Plaintiff: And by the Court—As the Action is not in this Case founded upon the Contract, but upon the Deceit, the Verdict is good. Cro. Eliz. 884. Gravenor v. Mete.

12. In an Action upon the Case for a false Return to a *Mandamus* the Plaintiff declared, that he was chosen Bailiff of the Borough of *A.* upon the first Day of *October* in a certain Year, which was alledged to be the customary Day for chooſing a Bailiff. The Defendant pleaded Not guilty, and Issue was joined upon the Plea. It was proved at the Trial, that the Plaintiff was chosen Bailiff upon the twenty-ninth Day of *September* in the Year mentioned, and that this is the customary Day for chooſing a Bailiff. It was objected, that as the Day, which is in this Case Parcel of the Custom, is material, the Election proved is a different one from that which is in Issue, and that for this Reason the Plaintiff ought not to recover. The Objection was over-ruled; and by *Holt* C. J. As the substantial Part of the Issue, namely, whether the Plaintiff was elected according to the Custom is proved, it is not material, whether the Election was upon the Day mentioned in the Declaration. Carth. 228. Vaughan v. Lewis.

13. In an Action upon the Case, in which the Declaration charged the incloſing of three Acres of Land, the Plaintiff alledged a Right of Common therein as appurtenant to sixty Acres of Land, sixty Acres of Meadow and eighty Acres of Pasture. The Defendant pleaded Not guilty, and Issue was joined upon the Plea. It being found by the Jury, that the Plaintiff had a Right of Common in the three Acres of Land, as appurtenant to a Messuage and ninety Acres of Land appurtenant to the Messuage, Judgment was given for the Plaintiff. A Writ of Error being brought it was assigned for Error, that the Right of Common found by the Verdict is different from that which is in Issue. The Judgment was affirmed: And by the Court—The Right of Common alledged is only Matter of Inducement; the substantial Part of the Issue being whether a Wrong has been done to the Plaintiff by incloſing. If the Issue had been, whether the Plaintiff's Right of Common were appurtenant to the Land, Meadow and Pasture mentioned in the Declaration, the Verdict would certainly have been bad: But it is not material upon the present Issue, whether the Plaintiff's Right of Common be found precisely as it is alledged. Cro. Ja. 630. Eardley v. Turnock.

14. An Action upon the Case in the Nature of a Conspiracy being brought against two, they both pleaded Not guilty, and Issue was joined upon the Plea. The Jury found only one of the Defendants Guilty. The Verdict was holden to be good: And by the Court—In an Action upon the Case in the Nature of a Conspiracy one Person may be found guilty. 2 Roll. Abr. 708. pl. 52.

15. But if in Action of Conspiracy against two, Issue be joined upon the Plea of Not guilty, and the Jury find only one of them guilty, the Verdict is bad; because one Person cannot be guilty of a Conspiracy. Ibid.

3. In

3. In an Action of Covenant.

2 Roll. Abr. 703. Hicks v. Goats.

16. The Plaintiff in an Action of Covenant declared, that upon the Sale of certain Land by the Defendant to him, which was eſtimated at a certain Number of Acres, the Defendant covenanted to pay him at the Rate of eleven Pounds by the Acre, for as many Acres as ſhould be wanting of the Number the Land was eſtimated at; and he alledged, that as many Acres were wanting, as did at the Rate of eleven Pounds by the Acre amount to the Sum of ſeven hundred Pounds. The Defendant pleaded, that there were not ſo many Acres wanting, as did at the Rate of eleven Pounds by the Acre amount to ſeven hundred Pounds, and Iſſue was joined upon the Plea. The Jury found a general Verdict for the Plaintiff: But they aſſeſſed Damages to the Amount of only four hundred Pounds. The Verdict was objected to as being variant from the Iſſue: But it was holden to be good: And by the Court—As the Deſign of the preſent Action was to recover Damages, it was intirely in the Breaſt of the Jury, notwithſtanding they found all the Acres to be wanting, to aſſeſs ſuch Damages as appeared to them to be reaſonable.

4. In an Action of Debt.

Cro. Ja. 449. Pemberton v. Skelton.

17. In an Action of Debt upon the 2 & 3 *E.* 6. for not ſetting out Tithes, the Defendant pleaded *Nil Debet*; the Jury found the Value of the Tithes ſubſtracted to be leſs than the Value alledged in the Plaintiff's Declaration. This was holden to be a Verdict for the Plaintiff: and by the Court—There is a Difference betwixt an Action of Debt founded upon a Specialty, or upon a Contract, and one founded upon a Statute giving an uncertain Sum by way of Severalty. In the former Caſe the Verdict cannot be for a leſſer Sum than is demanded, unleſs it be found that Part of the Debt was ſatisfied: But in the latter Caſe the Verdict is good, although a leſſer Sum than is demanded is found to be due.

2 Roll. Abr. 702. Baugh v. Philips.

18. The Plaintiff in an Action of Debt declared for the Sum of twenty-four Pounds eight Shillings. The Defendant pleaded *Nil debet*, and Iſſue was joined upon the Plea. The Jury found, that the Defendant was indebted to the Plaintiff in the Sum of twenty-four Pounds; but they likewiſe found, that he was not indebted to him in the further Sum of eight Shillings. It was holden that the Plaintiff ſhould have Judgment: And by the Court—The eight Shillings may have been paid.

2 Roll. Abr. 702. pl. 3.

19. The Plaintiff in an Action of Debt declared for the Sum of twenty Pounds. The Defendant pleaded *Nil debet*, and Iſſue was joined upon the Plea. The Jury found, that the Defendant was indebted to the Plaintiff in the Sum of forty Pounds. This was holden to be a Verdict for the Defendant.

2 Roll. Abr. 702. pl. 4.

20. In an Action of Debt brought againſt an Executor the Plaintiff declared for the Sum of twenty Pounds, the Defendant pleaded, that he had no Aſſets in his Hands, and Iſſue was joined upon the Plea. The Jury found, that the Defendant had Aſſets in his Hands to the Amount of forty Pounds. This was holden to be a Verdict for the Plaintiff; for, notwithſtanding it vary from the Iſſue, the ſubſtantial Part of the Iſſue, namely, whether the Defendant had Aſſets in his Hands ſufficient to ſatisfy the Plaintiff's Debt, is found for the Plaintiff.

Cro. Ja. 136. Lane v. Pledall, Mich. 4. Ja. 1.

21. In an Action of Debt the Plaintiff declared upon a Bond dated the twenty-fifth Day of *November*. The Defendant pleaded *Non eſt factum*, and Iſſue was joined upon the Plea. The Jury found a Bond dated the fifteenth Day of *November*. This was holden to be a Verdict for the Plaintiff; becauſe the ſubſtantial Part of the Iſſue, namely, whether the Bond be the Deed of the Defendant, is found for the Plaintiff.

22. But

22. But it is ſaid in a ſubſequent Caſe, that the Verdict would in ſuch Caſe be for the Defendant; becauſe the Bond found is not the Bond that is in Iſſue; and the Caſe of *Lane* v. *Pledall* is expreſsly denied to be Law. It is however in this Caſe laid down, that, if the Jury in ſuch Caſe find a Bond dated the ſame Day as the Bond upon which the Action is brought is alledged to be dated, the Verdict is for the Plaintiff; notwithſtanding they do likewiſe find, that the Bond was delivered upon a Day different from that on which it is dated. Salk. 463. Cromwell v. Grundſden, Paſch. 10 W. 3.

23. The Plaintiff in an Action of Debt declared upon a Bond entered into by the Defendant. The Defendant pleaded *Non eſt factum*, and Iſſue was joined upon the Plea. The Jury found a Bond entered into by the Defendant and *J. S.* This was holden to be a Verdict for the Plaintiff; for that, as the Defendant and *J. S.* did both ſeal and deliver the Bond, it is the Deed of each of them, and conſequently each of them is anſwerable for the whole Money thereupon due. 5 Rep. 119, Whelpdale's Caſe.

24. In an Action of Debt upon a Bond, conditioned for the Performance of the Covenants in an Indenture, one of which was that the Defendant ſhould not cut down Trees, the Breach aſſigned was cutting down twenty Trees. The Defendant pleaded, that he did not cut down twenty Trees, and Iſſue was joined upon the Plea. The Jury found, that the Defendant did not cut down twenty Trees; but they found, that he cut down ten. This was holden to be a Verdict for the Plaintiff: And by the Court—Although the Verdict vary from the Iſſue; yet, as enough is found to make the Defendant liable to the Penalty of the Bond, the Plaintiff ought to have Judgment. Dyer 115. Anon. 1 Inſt. 282. Hob. 53.

25. The Defendant in an Action of Debt pleaded Payment of the Money, for which the Action was brought, at *A.* Iſſue being joined upon the Plea, the Jury found that the Money was paid at *B.* This was holden to be a Verdict for the Defendant; for that, as the Payment of the Money is the ſubſtantial Part of the Iſſue, it is not material where it was paid. 1 Keb. 662. Lucas v. Harlow.

5. In an Action of Ejectment.

26. The Plaintiff in an Action of Ejectment declared upon a Leaſe from two Perſons. Iſſue being joined upon the Plea of Not guilty, the Jury found, that the Leſſors of the Plaintiff were Tenants in Common. This was holden to be a Verdict for the Defendant: And by the Court—As only one Leaſe is declared upon, and the Verdict does virtually find two, the Eſtates of Tenants in Common being ſeveral, the Variance is in a Matter of Subſtance. But it is ſaid, that if the Jury had found, that the Leſſors of the Plaintiff were Coparceners, the Verdict would have been for the Plaintiff; becauſe, as two Coparceners do only make one Heir, their joint Leaſe is as good as the joint Leaſe of two Joint-tenants would have been. 2 Roll. Abr. 719. pl. 25.

27. If the Plaintiff in an Action of Ejectment declare upon a Leaſe for a Term of Years made at a Day certain, the Term demiſed by which is to commence immediately, and the Jury find a Leaſe for the ſame Term made at another Day, the Verdict is for the Defendant, the Variance being in a Matter of Subſtance. 2 Roll. Abr. 704. pl. 20.

28. But if the Plaintiff in an Action of Ejectment declare upon a Leaſe for a Term of Years made the firſt Day of *May* in a certain Year, the Term demiſed by which is to commence at the *Michaelmas* Day following, and the Jury find a Leaſe for the ſame Term made the firſt Day of *June* in the ſame Year, the Term demiſed by which is to commence at the *Michaelmas* Day following, the Verdict is for the Plaintiff; for it is not material upon what Day the Leaſe was in ſuch Caſe made, provided it was made before the Day on which the Term was to commence. 2 Roll. Abr. 704. pl. 119.

29. If

Dalis. 105. 29. If the Plaintiff in an Action of Ejectment declare upon a Leaſe of twenty Acres, and the Defendant who has pleaded Not guilty, be found guilty as to ten Acres, the Verdict is good: But it is in this Caſe ſaid, that if the Defendant had pleaded *Non dimiſit*, and the Defendant had been found guilty as to ten Acres, the Verdict would have been bad.

2 Roll. Abr. 703. Brown v. Meredith. Paſch. 43 Eliz. 30. And it is in a ſubſequent Caſe laid down, that the Plaintiff would in ſuch Caſe be intitled to Judgment as to ten Acres, notwithſtanding the Defendant had pleaded *Non dimiſit*.

2 Roll. Abr. 720. Brown v. Ellis, Paſch. 3 Ja. 1. 31. But in a ſtill later Caſe it is laid down, that the Plaintiff would not in ſuch Caſe be entitled to Judgment; for that, as the Leaſe found is not that on which Iſſue is joined, the Variance is in a Matter of Subſtance.

2 Roll. Abr. 704. pl. 22. Jenk. 268. pl. 83. 32. If the Plaintiff in an Action of Ejectment declare upon a Leaſe of a Houſe, and the Jury find, that only Part of the Houſe is built upon the Land of the Plaintiff, he ſhall have Judgment for that Part.

Cro. Eliz. 13. Guy v. Rand. 33. The Plaintiff in an Action of Ejectment declared upon a Leaſe of a hundred Acres of Land. The Jury found the Defendant guilty as to forty Acres, and as to the Reſidue Not guilty. The Verdict was holden to be good.

1 Sid. 229. Ablett v. Skinner. 34. The Plaintiff in an Action of Ejectment declared upon a Leaſe of a fourth Part of a fifth Part of a Field. The Jury found the Defendant guilty as to a third Part of a fourth Part of a fifth Part. The Verdict was holden to be good; And by the Court—The Jury may always find the Defendant in an Action of Ejectment guilty as to ſo much as the Plaintiff proves a Title unto: But the Reporter ſubjoins a Query, in what Manner the Writ of Poſſeſſion is in ſuch Caſe to be executed?

MS. Rep. Burgeſs v. Burgeſs, Eaſt. 30 G. 2. in B. R. 35. The Plaintiff in an Action of Ejectment declared upon a Leaſe of a Moiety of certain Premiſſes. The Jury found the Defendant guilty as to a third Part of the Premiſſes. In Order to arreſt the Judgment it was ſaid, that the Verdict is bad; becauſe it does not find the Defendant guilty as to all that the Plaintiff has declared for. The Rule for arreſting the Judgment was diſcharged: And by Lord *Mansfield* Ch. J. there ſeems to be no good Reaſon, why the Plaintiff in an Action of Ejectment ſhould not recover that Part of what he has declared for to which he proves a Title; and it is laid down in 1 *Sid.* 229. that he may recover ſuch Part.

Latch 61. Hems v. Stroud. 36. If an Action of Ejectment be brought againſt a Huſband and his Wife, and only one of them be found guilty, the Verdict is good.

7. In an Action of Replevin.

Cro. Eliz. 799. Lewes v. Bucknall. Yelv. 148. 37. The Defendant in an Action of Replevin alledged, that the Plaintiff held Land of him by Fealty, Suit of Court, and the yearly Rent of three Shillings and four Pence; and he avowed the taking for Rent in Arrear. The Plaintiff traverſed the holding alledged by the Defendant, and Iſſue was joined upon the Traverſe. The Jury found, that the Plaintiff held of the Defendant by Fealty, and the yearly Rent of three Shillings and four Pence; but that he did not hold by Suit of Court. This was holden to be a Verdict for the Plaintiff; becauſe the whole of the Title to diſtrain alledged by the Avowant, every Part of which is material in Action of Replevin, is not found.

Hob. 72. Pope v. Skinner. 38. In an Action of Replevin the Defendant, a Commoner, avowed the taking of Cattle Damage-feaſant upon the eleventh Day of *April* in a certain Year. The Plaintiff replied, that *Williams*, another Commoner, had upon the thirtieth Day of *March* in the ſame Year demiſed his Right of Common

Common to the Plaintiff, to be holden by him from the twenty-fifth Day of the ſaid *March* for one Year. The Defendant traverſed the Demiſe, and Iſſue was joined upon the Traverſe. The Jury found a Demiſe from *Williams* to the Plaintiff, made the twenty-fifth Day of *March* in the ſame Year, by which *Williams* had demiſed his Right of Common to the Plaintiff for one Year from thence next enſuing. In order to arreſt the Judgment it was inſiſted, that the Demiſe found is different from that which is in Iſſue: But Judgment was given for the Plaintiff: And by the Court—The ſubſtantial Part of the Iſſue, namely, whether the Plaintiff had at the Time of taking his Cattle a Right of Common under a Demiſe from *Williams*, is found for him; and the Day of making the Demiſe is not material. The Reporter adds, that, if the Jury had found any other Right of Common in the Plaintiff than under a Demiſe from *Williams*, the Verdict would have been bad.

39. The Defendant in an Action of Replevin avowed the Taking of Cattle Damage-feaſant. In Bar of this Avowry the Plaintiff preſcribed for a Right of Common. Iſſue being joined upon the Preſcription, the Jury found, that the Plaintiff had a Right of Common; but they likewiſe found, that he ought to pay yearly for the ſame a Hen and five Eggs. This was holden to be a Verdict for the Plaintiff; for that, as the Payment is not Parcel of the Preſcription, but a collateral Recompence, for which the Perſon to whom it is due has a Remedy, it was not neceſſary for the Plaintiff to ſet out, that he was liable to the Payment, his Title to the Right of Common being complete without ſetting this out: But it is added, that if the Jury had found, that the Plaintiff had a Right of Common upon paying a Hen and five Eggs, the Verdict would have been for the Defendant; becauſe, as the Payment would then have been Parcel of the Preſcription, the Plaintiff would not, in Caſe he had omitted to ſet this out, have ſhewn a complete Title to the Right of Common. 5 Rep. 78. Gray's Caſe.

7. In an Action of Treſpaſs.

40. In an Action of Treſpaſs the Plaintiff declared, for the threſhing and carrying away of twenty Buſhels of Barley. The Defendant having pleaded Not guilty, the Jury found him guilty of carrying away the Barley, but not of threſhing it. This was holden to be a Verdict for the Plaintiff: And by the Court—Torts are ſeveral, and the carrying away of the Barley was a Tort, for which the Plaintiff is intitled to recover Damages. 2 Roll. Abr. 703. pl. 15.

41. In an Action of Treſpaſs the Plaintiff declared for breaking and entering his Cloſe. The Defendant having pleaded Not guilty, the Jury found, that the Treſpaſs was committed in the Cloſe, and that one Acre of the Cloſe was in the Poſſeſſion of the Plaintiff: But they likewiſe found, that a larger Part of the Cloſe was in the Poſſeſſion of the Defendant, and that a ſtill larger Part thereof was in the Poſſeſſion of *J. S.* This was holden to be a Verdict for the Plaintiff: And by the Court—As it is found, that the Treſpaſs was committed in the Cloſe, and that Part of the Cloſe was in the Poſſeſſion of the Plaintiff, he is intitled to recover Damages. Cro. Eliz. 170. Dod *v.* Coke. 2 Roll. Abr. 703. pl. 10.

42. In an Action of Treſpaſs the Plaintiff declared for breaking his Cloſe, and for eating his Graſs with divers Cattle, to wit, with Horſes, Oxen and Cows. The Defendant having pleaded Not guilty, the Jury found him guilty of breaking the Cloſe and eating the Graſs with divers Beaſts; and Judgment was given for the Plaintiff. A Writ of Error being brought, it was aſſigned for Error, that it is not found, that the Graſs was eaten by the Beaſts of any of the Kinds mentioned in the Declaration. The Judgment was affirmed: And by the Court—The ſubſtantial Part of the Iſſue Cro. Ja. 662. Elſton *v.* Durrant.

Iſſue, namely, whether the Graſs of the Plaintiff was eaten by divers Cattle of the Defendant, is found; and it is not material of what Kind the Beaſts were.

Cro. Ja. 134. Marler v. Ayliff and another.

43. In an Action of Treſpaſs againſt *J. S.* and *J. N.* the Plaintiff declared for taking his Gun. The Defendant *J. S.* pleaded, that the Plaintiff made an Aſſault upon *A B.* with the Gun, and that thereupon he, in order to keep the Peace and preſerve the Life of *A. B.* took the Gun. The Defendant *J. N.* pleaded Not guilty. Iſſues being joined upon both Pleas, the Jury found the Iſſue upon the firſt Plea for *J. S.* But they found *J. N.* guilty. In order to arreſt the Judgment againſt *J. N.* it was inſiſted, that, as the firſt Iſſue is found for *J. S.* there ought not to be Judgment againſt *J. N.* Judgment was given againſt him: And by the Court—As *J. N.* is found guilty, the Court, rather than ſuffer him to avail himſelf of the Plea of Juſtification found for *J. S.* will intend that the taking of the Gun by *J. N.* was at another Time. But it is ſaid, that if *J. S.* had pleaded a Gift of the Gun by the Plaintiff, and *J. N.* had pleaded Not guilty; and the Iſſue upon the Plea of *J. S.* had been found for him, there could not have been Judgment againſt *J. N.* notwithſtanding the Iſſue upon the Plea of Not guilty had been found againſt him; becauſe it would then have appeared to the Court, from the finding of the Iſſue upon the Plea of *J. S.* that the Plaintiff had no Cauſe of Action.

8. In divers other Actions.

Bro. Verd. pl. 99.

44. In an Action of Account the Defendant pleaded, that he had accounted before *J. S.* and *J. N.* Auditors aſſigned by the Plaintiff. Iſſue being joined upon the Plea, the Jury found that the Defendant had accounted before *J. S.* only. This was holden to be a Verdict for the Defendant: And by the Court—The ſubſtantial Part of the Iſſue, namely, whether he had accounted to an Auditor aſſigned by the Plaintiff, is found for him.

1 Inſt. 282.

45. In an Aſſize of Darrein Preſentment the Demandant alledged, that the Avoidance of the Church was by Deprivation of the laſt Incumbent. Iſſue being joined upon the Allegation, the Jury found, that the Avoidance of the Church was by the Death of the laſt Incumbent. This was holden to be a Verdict for the Demandant: And by the Court—The Avoidance of the Church is the ſubſtantial Part of the Iſſue, the Manner of avoiding being only a Circumſtance.

Noy 93. Dicker v. Mollard.

46. In a Writ of ſecond Deliverance the Plaintiff made Title under a Deed of Feoffment to *A.* and *B.* to his Uſe. The Defendant traverſed, that the Deed of Feoffment was to the Uſe of the Plaintiff, and Iſſue was joined upon the Traverſe. The Jury found a Deed of Feoffment to *A. B.* and *C.* to the Uſe of the Plaintiff. This was holden to be a Verdict for the Plaintiff: And by the Court—The ſubſtantial Part of the Iſſue is, whether a Deed of Feoffment was made to the Uſe of the Plaintiff, which being found, it is not material whether the Number of the Feoffees was two or three.

1 Ventr. 32. Anon.

47. In a Suit upon a Writ of Prohibition the Plaintiff alledged a *Modus.* The Defendant pleaded, that there is not ſuch a *Modus* as the Plaintiff has alledged. Iſſue being joined upon the Plea, the Jury found a *Modus* different from that alledged by the Plaintiff, and a Conſultation was prayed. It was holden, that a Conſultation ought not to be awarded: And by the Court—As the Jury have found, that there is a *Modus*, the Defendant ought not to be ſuffered to ſue in the Spiritual Court for Tithes in Kind.

9. In a criminal Proſecution.

48. In an Indictment for Murder the Jury, provided they are ſatisfied the Killing was not of Malice afore-thought, may find the Priſoner guilty of Manſlaughter; for the Killing is the ſubſtantial Part of the Iſſue.

49. It is ſaid to be uſual, to prefer two Indictments againſt a Perſon guilty of Homicide by Stabbing, one upon the Statute againſt Stabbing, and another for Murder, that, in Caſe the Evidence be not ſufficient to convict the Priſoner of Murder upon the Former Indictment, he may be convicted of Manſlaughter upon the latter. Foſt. 299.

50. But it is in other Books laid down, that the Perſon indicted upon the Statute againſt Stabbing may upon this Indictment be found guilty of Manſlaughter: For that the Killing is the ſubſtantial Part of the Iſſue. H. P C. 58. 1 Jo. 433. Kel. 132.

51. It was charged in an Indictment for Murder, that *Mackally* the Priſoner did felonioufly wound *Richard Fell*, and that he died of the Wound. The Jury found, that *Mackally* did give a Wound to *Richard Fell*, together with the Circumſtances which attended the giving of it, and that he died of the Wound; and they concluded their Verdict in theſe Words, "If upon the whole Matter the Court ſhall be of Opinion that the Killing "was Murder, then we find *Mackally* guilty of Murder in the Manner it "is charged in the Indictment." An Exception was taken, that, as the Jury had not found that *Mackally* did felonioufly wound *Richard Fell*, the Court could not adjudge, that the Wounding was felonious. The Exception was not allowed: And by the Court—The Jury may in any Caſe find the Fact with its Circumſtances, and ſubmit the Law ariſing thereupon to the Conſideration of the Court. In the preſent Caſe the Jury have moreover virtually found, that the Wounding was felonious; for they ſay, that, *if upon the whole Matter the Court ſhall be of Opinion that the Killing was Murder, then we find* Mackally *guilty of Murder in the Manner it is charged in the Indictment.* The Conſequence is, that as the Court have adjudged the Killing to be Murder, the Jury have found *Mackally* guilty of Murder in the Manner it is charged in the Indictment; and it is therein charged that the Wounding was felonious. 9 Rep. 63, 69. Mackally's Caſe.

52. In an Information againſt *J. S.* and *J. N.* the engroſſing of a thouſand Quarters of Corn was charged. The Defendants having both pleaded Not guilty, the Jury found that *J. S.* had engroſſed ſeven hundred Quarters of Corn. The other Defendant *J. N.* was found Not guilty. It was holden, that Judgment ſhould be given againſt *J. S.* becauſe the Information is for a Tort, and Torts are ſeveral. 2 Roll. Abr. 707. pl. 48.

(P) Of a Verdict where the Words Modo et Forma are contained in the Traverſe upon which Iſſue is joined.

1. IF Iſſue be joined upon a Traverſe in which the Words *Modo et Forma* are contained, ſome Circumſtances, that would not otherwiſe be ſo, are by theſe Words made material, and muſt be found by the Verdict. 2 Roll. Abr. 708. pl. 53.

2. If a Feoffment by Deed be traverſed, and the Words *Modo et Forma* are contained in the Traverſe, and the Jury find a Feoffment without Deed, 1 Inſt. 281.

the Verdict is bad; the Words *Modo et Forma* being in this Caſe eſſential to the Iſſue.

2 Roll. Abr. 702. pl. 2. 3. In an Action of Debt the Plaintiff declared, that the Defendant was indebted to him in the Sum of forty Shillings for a Horſe ſold. The Defendant pleaded *Nil debet Modo et Forma*, and Iſſue was joined upon the Plea. The Jury found, that the Defendant was indebted to the Plaintiff in the Sum of forty Shillings for two Horſes ſold. The Verdict was holden to be bad; becauſe the Contract found is different from that upon which Iſſue is joined.

2 Roll. Abr. 709. pl. 61. 4. In an Action of Replevin the Defendant avowed the Taking as a Diſtreſs for Rent in Arrear, and made Title in himſelf to diſtrain, by Virtue of an abſolute Deviſe from *J. S.* to him of the Place in which the Diſtreſs was taken. The Plaintiff replied, that *J. S.* did not deviſe to the Defendant *Modo et Forma* as he has alledged, and Iſſue was joined upon the Replication. The Jury found a Deviſe from *J. S.* to the Defendant upon a Condition precedent; and they alſo found, that the Condition was performed at the Time the Deviſe was pleaded. The Verdict was holden to be for the Plaintiff: And by the Court—As the Deviſe to the Defendant is conditional, and not abſolute, it is not ſuch a Deviſe as he has alledged.

1 Jon. 224. Rex v. Nudigate. 5. A Deviſe by *J. S.* of certain Premiſſes to *J. N.* in Fee having been pleaded, the Plaintiff replied, that *J. S.* did not deviſe *Modo et Forma* as the Defendant has alledged. Iſſue being joined upon the Replication, the Jury found, that *J. S.* deviſed the Premiſſes to *A.* for a Term of Years, with Remainder to *J. N.* in Fee, and that the Term was ſubſiſting. It was holden, that, as the Deviſe found is ſubſtantially different from that on which the Iſſue is joined, the one being a Deviſe of an Eſtate in Poſſeſſion, the other a Deviſe of an Eſtate in Remainder, it is not ſuch a Deviſe as the Defendant has alledged.

6. Upon conſidering the Caſes already cited it will appear, that the Circumſtances traverſed by Traverſes in which the Words *Modo et Forma* were contained were holden to be material, becauſe they were eſſential to the Iſſues: From whence it may be fairly inferred, that the Verdict was not in any one of the Caſes holden to be bad, meerly becauſe the Words *Modo et Forma* were contained in the Traverſe upon which it was joined; but becauſe the Jury had not found a Circumſtance, which was eſſential to the Iſſue.

7. It will appear from ſome other Caſes which ſhall be mentioned, that, although the Words *Modo et Forma* are contained in the Traverſe upon which Iſſue is joined, the Materiality of what is traverſed does very ſeldom depend upon theſe Words.

1 Inſt. 281. 8. It is in one Book laid down generally, that, although the Words *Modo et Forma* are contained in the Traverſe upon which Iſſue is joined, it is not neceſſary, that the Verdict ſhould find every Circumſtance which is traverſed; for that, if all the material Circumſtances of the Iſſue are found, it is not neceſſary that any immaterial Circumſtance ſhould be found.

Ibid. 9. If a Man bring a Writ of Entry in *Caſu proviſo* upon the Alienation of Tenant in Dower to his Diſheriſon, and alledge an Alienation in Fee; and the Tenant plead, that ſhe did not alienate *Modo et Forma*, and Iſſue be joined upon the Plea, and it be found by the Jury, that the Tenant did alienate in Tail or for Life, the Demandant ſhall recover, notwithſtanding the Alienation was not ſuch an Alienation as is alledged; becauſe, as the ſubſtantial Part of the Iſſue, namely, whether the Tenant did alienate to the Diſheriſon of the Demandant, is found, the Manner of alienating is not material.

1 Inſt. 282. 10. In an Action of Treſpaſs the Plaintiff declared for the Taking of his Goods upon a Day certain, and at a Place certain. The Defendant pleaded Not guilty *Modo et Forma* as the Plaintiff has alledged, and Iſſue was joined upon the Plea. The Jury found the Defendant guilty upon another Day, and at another Place. The Verdict was holden to be good; becauſe

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the ſubſtantial Part of the Iſſue, namely, whether the Goods were taken, is found, and neither the Day when, nor the Place where, they were taken is material.

11. In an Action of Treſpaſs *Quare clauſum fregit* the Defendant juſtified under a Right of Common in the *Locus in Quo*, from the Day of Pentecoſt in every Year to a Day certain in the ſame Year. The Plaintiff traverſed, that the Defendant had a Right of Common *Modo et Forma* as he had alledged, and Iſſue was joined upon the Traverſe. The Jury found, that the Defendant had a Right of Common upon the Day of Pentecoſt in every Year, and from the Day next thereunto, until the Day certain in the ſame Year mentioned in his Plea. This was holden to be a Verdict for the Defendant; becauſe the ſubſtantial Part of the Iſſue, namely, whether he had a Right of Common at the Time the Treſpaſs is charged, is found; and it is not neceſſary, that the Title of the Defendant to the Right of Common ſhould in ſuch Caſe be found preciſely as it is ſet out. But it was in this Caſe agreed, that if a Man bring an Aſſize of Right of Common, it is neceſſary to ſet out a Title thereto, and that this muſt be found preciſely as it is ſet out; for that the Demandant is not in ſuch Caſe intitled to recover, unleſs it be found by the Jury, that he has the very Title to the Right of Common which is ſet out.

Moor 864. Thorowgood v. Johnſon. 2 Roll. Abr. 708. pl. 55. S. C.

12. In an Action of Treſpaſs, the Plaintiff declared for Breaking his Houſe and taking his Goods. The Defendant pleaded, that the Houſe is holden of him, as of his Manor of *A.* by Homage, Fealty, Eſcuage, Suit of Court, and the yearly Rent of one Pound of Cummin Seed, and that he entered the Houſe and diſtrained the Goods for three Years Rent in Arrear. The Plaintiff replied, that the Houſe is holden of *J. S.* as of his Manor of *B. abſque hoc* that it is holden of the Defendant *Modo et Forma* as he has alledged. Iſſue being joined upon the Replication the Jury found, that the Houſe is holden of the Defendant, as of his Manor of *A.* by Homage, Fealty, and the yearly Rent of one Pound of Cummin Seed, and not otherwiſe. This was holden to be a Verdict for the Defendant: And by the Court—Notwithſtanding the Verdict does not find the Holding to be preciſely as the Defendant has alledged, it finds the ſubſtantial Part of the Iſſue, that the Houſe is holden of the Defendant; which, although it would not have been ſufficient Finding in an Action of Replevin, is ſo in the preſent Action, wherein the Defendant is charged as a Wrong-doer.

Yelv. 148. Goodman v. Ayling.

13. The Declaration in an Action upon the Caſe charged the ſpeaking of the following Words, *There is a great Neſt of Thieves at* Pirton, *and Sir* John Brugis *is the Maintainer of them, and he is a ſtrong Thief himſelf.* The Defendant traverſed the Speaking of the Words *Modo et Forma* as the Plaintiff has alledged. Iſſue being joined upon the Traverſe, the Jury found, that the Defendant ſpoke all the Words charged except the Word *ſtrong*, and aſſeſſed Damages for the Plaintiff. Upon a Motion in Arreſt of Judgment it was inſiſted, that, as all the Words charged are not found to have been ſpoken by the Defendant, the Plaintiff ought not to have Judgment: But Judgment was after Deliberation given for the Plaintiff.

Dyer 75. Brugis v. Warneford.

14. In an Action upon the Caſe the Plaintiff charged the ſpeaking of the following Words, *If Sir* John Sidenham *might have his Way he would kill the King.* The Defendant traverſed the ſpeaking of the Words *Modo et Forma* as the Plaintiff has alledged. Iſſue being joined upon the Traverſe, the Jury found, that the Defendant ſpoke the following Words, *I think in my Conſcience if Sir* John Sidenham *might have his Way he would kill the King.* *Haughton* J. was of Opinion, that, as the Jury have found other Words as well as thoſe charged, the Verdict is for the Defendant: But *Montague* Ch. J. *Croke* J. and *Dodderidge* J. were of Opinion, that, as the Words charged are all found, and the other Words found do not alter

Cro. Ja. 407. Sidenham v. Man.

the Senſe or take off the Force of the Words charged, the Verdict is for the Plaintiff; and Judgment was given for him. A Writ of Error being brought in the Exchequer-Chamber, *Hobart* Ch. J. of the Common Pleas, *Wynch* and *Denham* were of Opinion, that, as the Manner and Form of ſpeaking the Words is traverſed, and they are not found to have been ſpoken preciſely as they are charged, the Verdict is for the Defendant: But *Tanfield* Ch. Bar. *Warburton*, *Bromley* and *Hutton* being of a different Opinion, the Judgment of the Court of King's Bench was affirmed.

(Q) Of a Verdict which does not find the Matter in Iſſue with Certainty.

Mar. 97. Juxon *v.* Andrews.

1. IN an Action of Ejectment for a Meſſuage, the Jury found the Defendant guilty as to ſo much of the Meſſuage as ſtands upon a certain Bank. The Verdict was holden to be bad, becauſe it is Uncertain: And by the Court—Although a Verdict which finds the Defendant guilty as to Part of what is demanded in Ejectment may be good, it can only be ſo where the Defendant is found guilty as to a certain Part; becauſe, if the Verdict do not find ſomething in Certainty, the Court cannot give Judgment; for the Maxim is *Oportet quod res certa deducatur in Judicium.*

2 Roll. Abr. 694. U. pl. 2.

2. In an Action of Dower the Tenant pleaded, that the Huſband of the Demandant was never ſeized of the Premiſſes of which ſhe demanded Dower. Iſſue being joined upon the Plea, the Jury found, that the Huſband was ſeized of the Premiſſes, except ſo much thereof as belonged to *J. S.* The Verdict was holden to be bad; becauſe, as it does not appear what Part of the Premiſſes did belong to *J. S.* the Court cannot tell of how much to give Judgment.

Cro. Car. 521. Morris *v.* Prince.

3. In an Aſſize the Demand was of an Arrear of a Rent-charge of twenty Pounds deviſed to the Demandant. The Jury found, that the Rent-charge was in Arrear for the Term of thirty Years; but they did not find when the Deviſor died. The Verdict was upon a Writ of Error holden to be bad; becauſe, as the Time of the Deviſor's Death is not found, it does not appear at what Time the thirty Years ended, for which the Rent-charge is found to be in Arrear.

Cro. Ja. 653. Treſwell *v.* Middleton.

4. In an Action of Debt the Plaintiff declared for divers Sums of Money, amounting in the whole to forty Pounds. Iſſue being joined upon the Plea of *Nil debet*, the Jury found, that the Defendant was indebted to the Plaintiff in the Sum of thirty Pounds, but that the Reſidue of the forty Pounds was not due to the Plaintiff. Judgment being given for the Plaintiff, it was upon a Writ of Error holden, that, as the Verdict does not find in which of the particular Sums the Defendant was indebted to the Plaintiff, he ought not to have had Judgment; becauſe, as it is uncertain for which of the Sums the Judgment was given, the Defendant can never know how to plead the Judgment in Bar, in Caſe another Action ſhould be brought for any of the Sums; and the Judgment was reverſed.

5. It appears from the Caſes already cited, that the Verdicts therein were holden to be bad; becauſe they were uncertain as to ſomething which was material to the Giſt of the Action; and it may be inferred from the following Caſes, that if the Thing, as to which a Verdict is uncertain, be not

not eſſential to the Iſſue, the Verdict is notwithſtanding ſuch Uncertainty good.

6. In an Action of Treſpaſs *Quare clauſum fregit* the Declaration charged, that the Treſpaſs was committed in a certain Acre of Land, of which the Abuttals were ſet forth. Iſſue being joined upon the Plea of Not guilty, the Jury found the Defendant guilty of a Treſpaſs in one Half of the Acre, and aſſeſſed Damages for the Plaintiff: But they did not find in which Half the Treſpaſs was committed. The Verdict was holden to be certain enough: And by the Court—As Damages are to be recovered in this Action and not the Land itſelf, the Plaintiff may recover Damages for a Treſpaſs in one Half of the Acre, and it is not material in which Half it was committed. Noy 125. Wingſworth v. May. Mar. 97.

7. In an Action of Debt upon the 1 *Ja.* 1. *c.* 22. for felling Oaks at a Time prohibited, Not guilty was pleaded, and Iſſue was joined upon the Plea. The Jury found, that the Defendant had felled ten Oaks, and that the Value of each was ſix Shillings and eight Pence. Upon a Motion in Arreſt of Judgment it was inſiſted, that the Verdict is bad; becauſe the Jury have not added the Sums together and found a preciſe Sum. The Verdict was holden to be good: And by the Court—If the Defendant had pleaded *Nil debet* the Verdict would have been bad, for want of having found a preciſe Sum to be due: But it is not neceſſary, that a preciſe Sum ſhould be found to be due, where the Plea in an Action of Debt is Not guilty. 1 Keb. 835. Duke of Norfolk v. Johnſon.

8. An Indictment was found againſt a Perſon, for exerciſing a Trade unlawfully for the Space of three Months, to wit, from a Day certain to a Day certain. Iſſue being joined upon the Plea of Not guilty, the Defendant was found Guilty as to one Month without ſaying which, and Not guilty as to the two other Months. Upon a Motion in Arreſt of Judgment it was inſiſted, that, as it does not appear for which of the three Months the Defendant is found guilty, he cannot plead a Conviction upon this Indictment in Bar of a ſecond for the ſame Offence. The Verdict was holden to be certain enough: And by the Court—If a ſecond Indictment ſhould be found againſt the Defendant, he may plead a Conviction upon the firſt Indictment for one Month, and traverſe his having been guilty any other Month. 12 Mod. 561. Anon.

(R) Of a Verdict which does not find the Matter in Iſſue expreſsly.

1. THE Matter in Iſſue was, whether *J. S.* had reſigned a certain Benefice to a certain Biſhop. The Jury found an Inſtrument under the Seal of the Biſhop, upon which there was an Indorſement, that *J. S.* had reſigned the Benefice to the Biſhop, and that he had accepted the Reſignation. The Verdict was holden to be bad; becauſe it does not find expreſsly that *J. S.* had reſigned the Benefice. Noy 147. Smith v. Foaves.

2. An Eſtate having been granted by Copy of Court Roll to three Perſons for their Lives, the Matter in Iſſue was, whether a Heriot was by the Cuſtom of the Manor due upon the Death of one of the three Perſons. The Jury found, that the Cuſtom of the Manor did not warrant the granting of an Eſtate for three Lives. The Verdict was holden to be bad; becauſe it does only find argumentatively, that a Heriot ought not 2 Roll. Abr. 693. S. pl. 1.

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to be paid; whereas it is the Duty of the Jury to find the Matter in Iſſue expreſsly.

2 Rol Abr. 693 S. pl. 2. 3. If the Matter in Iſſue be, whether an Eſtate may by the Cuſtom of a Manor be granted by Copy of Court Roll for two Lives, and the Jury find, that an Eſtate may by the Cuſtom of the Manor be granted for three Lives, the Verdict is bad; becauſe it is only argumentative to ſay, that, in as much as a greater Eſtate may by the Cuſtom of the Manor be granted, a leſſer one may.

2 Roll. Abr. 695. pl. 6. 4. In an Action of *Aſſumpſit* the Plaintiff declared, that the Defendant in Conſideration of four Pence promiſed to give the Plaintiff forty Pounds. Iſſue being joined upon the Plea of *Non Aſſumpſit*, the Jury found a ſpecial Verdict in theſe Words, "If the Law will, that the Jury ſhall give Damages to the Amount of forty Pounds, then they aſſeſs Damages to that Amount: But if the Law will, that the Jury may give Damages as they pleaſe, then they aſſeſs Damages to the Amount of three Pounds and no more." The Verdict was holden to be bad; becauſe the Jury have not aſſeſſed any Damages expreſsly.

Cro. Car. 550. Criſp. v. Pratt. 5. If the Matter in Iſſue be, whether a Thing is fraudulent, the Court will never conclude that it is ſo, however ſtrong the Circumſtances of Fraud found by the Jury are.

2 Mod. 244, 245. Mires v. Solebay. 10 Rep. 57. 6. In an Action of Trover the Court will never intend, that the Defendant is guilty of a Converſion, unleſs it be expreſsly found that he is, however ſtrongly the Circumſtances found by the Jury do tend to ſhew that he is guilty

12 Mod. 628. Rex v. Plummer. 7. The Court will never intend, from any Evidence or Circumſtances found by the Jury, that the Defendant in an Indictment is guilty of the Offence therein charged, unleſs the Jury do expreſsly find him guilty.

(S) Of a Verdict which finds a Matter in a Foreign County.

Bro. Attaint. pl. 104. 1. IF the *Venue* in an Action for a tranſitory Treſpaſs be laid in the County of *A.* a Jury of the County of *A.* may find a Verdict in the Action; notwithſtanding it appear in Evidence, that the Treſpaſs was committed in the County of *B.* But it is added, that they are not bound to find a Verdict.

6 Rep. 47. Dowdale's Caſe. 2. The latter Part of the Doctrine of this Book is in another Book expreſsly denied to be Law; and it is in the latter laid down, that, although a *Venue* muſt in every Action be laid in ſome Place, the Place is not material in an Action for a tranſitory Treſpaſs; and that the Jury of the County where the *Venue* in an Action for ſuch Treſpaſs is laid are bound, under the Penalty of an Attaint, to find the Defendant guilty, although it appear in Evidence, that the Treſpaſs was committed in another County.

Ibid. 3. In an Action of Debt againſt an Executor he pleaded *Plene Adminiſtravit*. The Plaintiff replied, that the Executor had Aſſets at *Exeter* in the County of *Devon*. Iſſue being joined upon the Replication, the Jury found, that the Defendant had Aſſets in *Ireland*. This was holden to be a Verdict for the Plaintiff: And by the Court—It is uſual for Merchants to have great Part of their Goods in foreign Parts, and God forbid, that ſuch Goods ſhould not be liable to their Debts in *England*.

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4. It is in the general true, that the Jury ought to find every local Matter in its proper County. Bro. Verd. pl. 80. 2 Roll Abr. 688. M. pl. 1.

5. But if an Action be brought for a local Matter in the County of *A.* and the Defendant, by pleading a Releaſe in the County of *B.* make it neceſſary to try the Iſſue concerning the Validity of the Releaſe in the County of *B.* the Jury of the County of *B.* may aſſeſs Damages for the local Matter in the County of *A.* It being a Maxim of Law, that *multa conceduntur per obliquum quæ non conceduntur per directum.* 6 Rep. 47. Dowdale's Caſe. Bro. Damage. pl. 53. pl. 103. Bro. Trial, pl. 118. 2 Roll. Abr. 687. pl. 1.

6. If in an Action brought in the County of *A.* the general Iſſue be pleaded, the Jury of the County of *A.* may find a local Matter in any other County, provided the Matter be incidental to the Iſſue joined in the County of *A.*

7. In an Action of Debt upon the Statute againſt bargaining for pretended Titles, the Bargain was alledged to have been made in the County of *Norfolk*; but the Land bargained for was in the County of *Suffolk*. The Defendant pleaded *Nil debet*, and Iſſue was joined upon the Plea. It was holden, that the Jury of the County of *Norfolk*, who tried the Iſſue, might find the Value of the Land; becauſe the Value thereof is incidental to the Iſſue. 2 Roll. Abr. 688. Pike v. Haſten. 3 Leon. 233.

8. If in an Action of Debt brought in the County of *A.* againſt an Heir he pleaded *Riens per Deſcent*, and Iſſue be joined upon the Plea, the Jury may find *Aſſets per Deſcent* in any County; becauſe the Heir is anſwerable for all *Aſſets per Deſcent*. 6 Rep. 47. Dowdale's Caſe.

9. In an Action of *Detinue* for a Releaſe made in the County of *A.* the Plaintiff alledged, that by Reaſon of the Detention of the Releaſe he loſt Lands in the County of *B.* The Defendant pleaded *Non Detinet*, and Iſſue was joined upon the Plea. It was holden, that the Jury of the County of *A.* who tried the Iſſue, might aſſeſs Damages to the Value of the Land: And by the Court—As the Loſs of the Land is laid in Aggravation of Damages, it is incidental to the Iſſue. Bro. Damage, pl. 87. Jenk. 20. pl. 38.

10. There ſeems to be good Reaſon, that the Jury, who try an Iſſue, ſhould in every Caſe aſſeſs Damages for a Matter in a foreign County, which is laid in Aggravation of Damages, notwithſtanding the Matter be local; otherwiſe a Writ muſt go to a Jury of the foreign County to inquire of the Damages in that County, which would not be ſo proper; becauſe a Jury are not liable to an Attaint, for a falſe Verdict upon a Writ to inquire of Damages. 2 Roll. Abr. 688. L. pl. 3.

11. If an Action be brought in an inferior Court, the Jury, by whom an Iſſue in the Action is tried, may find any Matter incidental to the Iſſue; although it ariſe out of the Juriſdiction of the Court.

12. An Action of Debt being brought in an inferior Court againſt *J. S.* as Heir to *J. N.* The Defendant pleaded *Riens per Deſcent*, and Iſſue was joined upon the Plea. The Jury found Aſſets out of the Juriſdiction of the Court, and the Plaintiff had Judgment. A Writ of Error being brought, it was aſſigned for Error, that the Jury had no Power to find Aſſets out of the Juriſdiction of the inferior Court. The Judgment was affirmed: And by the Court—As the Matter found out of the Juriſdiction of the inferior Court is incidental to the Iſſue, the Verdict is good. Cro. Ja. 502. Bourn v. Carrington.

13. In an Action upon the Caſe for Words, brought in an inferior Court, the Plaintiff alledged, that by Reaſon of the ſpeaking of the Words he loſt Cuſtomers at a Place out of the Juriſdiction of the Court. The Defendant having pleaded Not guilty, the Jury found a Verdict for the Plaintiff, and aſſeſſed Damages to the Amount of a hundred Marks; and Judgment was given for the Plaintiff. A Writ of Error being brought, it Cro. Car. 570. Ireland v. Lockwell.

it was aſſigned for Error, that the Jury have aſſeſſed Damages for a Matter ariſing out of the Juriſdiction of the Court, which it was ſaid they had no Power to do. The Judgment was affirmed: And by the Court—The Jury, by whom an Iſſue is tried in an inferior Court, cannot find an original Matter, unleſs the ſame aroſe within the Juriſdicton of the Court: But the Verdict is in the preſent Caſe good; becauſe the Matter alledged out of the Juriſdiction of the Court, which is laid in Aggravation of Damages, is not an original Matter, but incidental to the Iſſue.

6 Rep. 47. Dowdale's Caſe.

14. It is a Rule of Law, that a Jury cannot find a Perſon indicted for an Offence guilty, in any other County than that wherein the Offence was committed; it being a Maxim of Law, that *Ubi quis delinquit ibi punietur.*

H. P. C. 69. 1 Hawk. 89

15. But if *J. S.* who has ſtolen Goods in the County of *A.* carry them into the County of *B.* he may be found guilty of Larceny in the County of *B.* for, as the legal Poſſeſſion as well as the Property of the Goods ſtolen does, notwithſtanding the felonious taking, continue in the Perſon from whom they were taken, every Moment's Continuance of the illegal Poſſeſſion obtained by the Thief is as much a felonious taking, as the firſt taking was; and conſequently he does, by continuing the illegal Poſſeſſion of the Goods in the County of *B.* become guilty of Larceny in that County.

(T) Of a Verdict which is contrary to a Matter of Record.

Bro. Verd. pl. 96.

1. EVERY Verdict, ſo far as it is contrary to a Matter of Record, is bad; becauſe more Credit is due to the Record than to the Verdict

Ibid.

2. If the Jury find any Thing contrary to what one of the Parties to the Action has confeſſed, the Verdict is as to ſo much bad; becauſe it is a Finding contrary to a Matter of Record.

Palm. 20. Crawley's Caſe, there cited. 1 Roll. Rep. 443.

3. To a Writ of *Scire Facias* brought againſt *J. S.* as Heir to his Father, upon a Recognizance entered into by his Father, he pleaded *Riens per Deſcent.* Iſſue being joined upon the Plea, the Jury found, that *J. S.* had Land by Deſcent as Heir to his Father; and the Plaintiff had Execution of the Land. An Action of Ejectment being afterwards brought by *J. S.* in order to recover the Poſſeſſion of the ſame Land, the Jury found, that the Land did not deſcend to *J. S.* as Heir to his Father; but that it came to him as Donee in Tail upon the Death of his Father. The Verdict was holden to be bad; becauſe it is contrary to the Verdict in the Action upon the Writ of *Scire Facias*; it being thereby found, that the Land did deſcend to *J. S.* as Heir to his Father.

1 Roll. Rep. 443 Crawley v. Morton.

4. It is in one Book laid down generally, that, if a Verdict have been found againſt a Tenant in Tail, no one of the Iſſue in Tail can falſify the Verdict.

Ld. Raym. 1050. Trevivan v. Lawrence.

5. But in another Book it is ſaid, That, although no one of the Iſſue in Tail can falſify a Verdict, which has been found againſt a Tenant in Tail, directly, he may do it obliquely; as by ſhewing, that the Tenant in Tail did not give a material Thing in Evidence, which it is in his Power to give.

6. If

6. If a *Venire Facias de Novo* have been awarded, the first Verdict, notwithstanding it be continued upon the Record, is a Nullity; and consequently the second Verdict is not bad, although it be contrary to the first. Cro. Ja. 627. Langley v. Pain.

(U) Of a Verdict which is contrary to a Matter of Estoppel.

1. IT is more proper to plead a Matter of Estoppel, than to give it in Evidence; because, when the Matter of Estoppel is pleaded, the Judgment of the Court may be had thereupon without going to Trial. 1 Inst. 227.

2. But a Matter of Estoppel may be given in Evidence; and if such Matter be given in Evidence, and the Jury find contrary thereto, the Verdict is bad. 1 Inst. 227. Dyer 171. 2 Rep. 4. Cro. Eliz. 140. 1 Leon. 206.

3. If *J. S.* after having by Indenture demised certain Premisses for a Term of Years, do during the Term bring an Action of Ejectment for the Recovery of the Possession of the Premisses, and the Indenture be given in Evidence, and the Jury find contrary thereto, the Verdict is bad; because it is contrary to a Matter of Estoppel: For the Jury ought in such Case either to find for the Defendant, or to find the Matter specially. Cro. Car. 110. Isham v. Morrice. 2 Rep. 4. B.

(W) Of a Verdict which is contrary to something that is confessed, or not denied, in the Pleadings.

1. IF the Jury find one Thing contrary to some other Thing, that is confessed, or not denied, in the Pleadings, the Verdict is as to so much bad; because the Jury had nothing to do with that which is confessed, or not denied, in the Pleadings. Dyer 147. 2 Rep. 4. Cro. Eliz. 283. 2 Roll. Abr. 691. R. pl. 1.

2. The Tenant in an Action of Dower pleaded, that the Husband of the Demandant did not die seised of the Estate of which she demanded Dower, and Issue was joined upon the Plea. The Jury found, that the Husband died seised; but they likewise found, that the Estate was not liable to Dower. The latter Part of the Verdict was holden to be bad; because the Plea, which does not deny the Liability of the Estate to Dower, does virtually confess it. 2 Roll. Abr. 691. R. pl. 2.

3. If the Defendant in an Action of Waste, wherein the Waste is charged in a Place called *A.* plead, that there is no such Place as *A.* and Issue be joined upon the Plea, and it be found against him, the Jury have no Power to enquire whether the Waste were committed; because the Commission of the Waste is not denied in the Plea. 2 Roll. Rep. 691. R. pl. 3.

4. An Action of Debt being brought upon a Bond, with Condition to perform an Award to be made by *J. S.* the Defendant pleaded, that 2 Roll. Abr. 690. pl. 10.

J. S.

J. S. did not make the Award alledged by the Plaintiff. The Plaintiff replied, that *J. S.* did make the Award; and Iſſue was joined upon the Replication. The Jury found, that *J. S.* did make the Award; but they found likewiſe a Matter in Avoidance thereof. The latter Part of the Verdict was holden to be bad: And by the Court—The Award, as the Iſſue is only whether *J. S.* did make it, ſhall be taken to be good, unleſs it appear upon the Face thereof to be bad; and, as the Defendant could not have rejoined any Matter in Avoidance of the Award, becauſe this would have been a Departure, the Jury had no Power to find ſuch Matter.

Jenk. 102. Molineux's Caſe.

5. In an Action of Debt againſt an Heir, upon the Bond of his Father, the Defendant pleaded, that he had nothing by Deſcent except twenty Acres of Land in *A.* The Plaintiff replied, that beſides the twenty Acres in *A.* he had forty Acres of Land by Deſcent in *B.* The Defendant rejoined, that he had not forty Acres of Land by Deſcent in *B.* and the Iſſue joined upon the Rejoinder was found for him. It was holden, that the Plaintiff ſhould have Judgment, notwithſtanding the Verdict for the Defendant: And by the Court—As the Defendant has confeſſed the having of twenty Acres of Land by Deſcent, the Plaintiff has a Right to Judgment as to theſe.

2 Mod. 5. Wilcox *v.* Skipwith.

6. In an Action of Replevin the Defendant alledged, that the Plaintiff held of him by the yearly Rent of twelve Shillings, and a Heriot upon every Alienation; and he avowed the Taking for a Heriot. The Plaintiff traverſed, that a Heriot was due upon every Alienation, and Iſſue was joined upon the Traverſe. The Jury found, that the Holding was by the yearly Rent of three Shillings, and a Heriot upon every Alienation. Upon a Motion in Arreſt of Judgment it was inſiſted, that the Defendant ought not to have Judgment; becauſe the Tenure found is different from that alledged. Judgment was given for the Defendant: And by the Court—It is alledged in the Pleadings, that the Plaintiff held of the Defendant by the yearly Rent of twelve Shillings, and Heriot upon every Alienation; and it is a Rule of Law, that whatever is well alledged in the Pleadings, and not denied, ſhall be taken to be as alledged, notwithſtanding the Jury find contrary thereto.

(X) What Omiſſion in the Pleadings is cured by a Verdict.

2 Lill. Abr. 797.

1. THE want of having ſet out the Writ, which would be bad upon a Demurrer, is cured by a Verdict; for the Court will, in ſupport of the Verdict, intend it to have been proved at the Trial, that there was a Writ.

Ibid.

2. But if a Writ, which appears upon the Face thereof to be bad, is ſet out, the Badneſs of the Writ is not cured by a Verdict; for it can never be intended, that ſuch Writ was proved to be good.

Carth. 389. Blackall *v.* Eale.

3. If it be not alledged in the Declaration in an Action of Treſpaſs, that the Treſpaſs charged was committed upon a Day certain, the Declaration is bad upon Demurrer.

Salk. 662. S. C. 5 Mod. 287. S. C.

4. But

4. But the Omiſſion of ſuch Allegation is cured by a Verdict; for, as the Day is not material in an Action of Treſpaſs, the Court will in Support of the Verdict intend, that the Treſpaſs was proved to have been committed upon a Day antecedent to the Commencement of the Action. Carth. 389. Blackall v. Eale. Salk. 662. S. C. 5 Mod. 287. S. C.

5. If a defective Title be ſet out in the Pleadings, the Defect is cured by a Verdict; for the Court will in Support of the Verdict intend, that it was ſupplied by Evidence: But if a bad Title be ſet out in the Pleadings, the Badneſs is not cured by a Verdict; for the Court will never intend, that a Title, which is apparently bad, was proved to be good. Plowd. 202. Salk. 365.

6. In an Action of *Aſſumpſit* upon a Bill of Exchange there was a Verdict for the Plaintiff, and Judgment was given for him. A Writ of Error being brought, it was aſſigned for Error, that it is not alledged in the Declaration, that the Plaintiff did pay the Money due upon the Bill to the laſt Indorſee; and that, as this is not alledged, the Plaintiff ought not to recover; becauſe the Defendant, unleſs the Money were paid to the laſt Indorſee, is liable to an Action for it. The Judgment was affirmed: And by the Court—After a Verdict it ſhall be intended, that the Money was proved to have been paid to the laſt Indorſee. It is alledged, that the Money was paid upon Account of the Defendant, which it cannot have been, unleſs it was paid to the laſt Indorſee. Carth. 130. Brunetti v. Lewin.

7. In an Action of Covenant the Breach aſſigned was, that the Defendant did not offer to grant an Advowſon to the Plaintiff, before he granted it to *J. S.* The Defendant pleaded, that he did not grant the Advowſon to *J. S.* and Iſſue was joined upon the Plea. A Verdict being found for the Plaintiff, it was in Arreſt of Judgment inſiſted, that it is not alledged, that the Defendant granted the Advowſon to *J. S.* by Deed, and conſequently, as no Grant of an Advowſon except it be by Deed is good, there is not a Breach of Covenant aſſigned. Judgment was given for the Plaintiff: And by the Court—It ſhall, in Support of the Verdict be intended, that a Grant to *J. S.* by Deed was proved. Hutt. 54. Lightfoot v. Brightman.

8. In another Book, wherein this Caſe is cited, it is ſaid, that, as no Grant of an Advowſon except it be by Deed is good, it is to be preſumed, that the Jury would not have found a Verdict for the Plaintiff, unleſs a Grant to *J. S.* by Deed had been proved. 10 Mod. 301. Muſton v. Yateman.

9. The Omiſſion of alledging a Matter in the Pleadings, which is eſſential to the Action, is never cured by a Verdict; becauſe every ſuch Matter, it being traverſable, muſt be alledged, that it may be put in Iſſue.

10. If the Declaration in an Action of Treſpaſs, brought by a Maſter for the beating of his Servant, do not charge, that by Reaſon of the beating the Plaintiff loſt the Service of his Servant, the Omiſſion is not cured by a Verdict; the Loſs of Service being the Giſt of the Action. 1 Bulſtr. 163. Anon.

11. The Declaration in an Action of Treſpaſs, brought for keeping a Bull accuſtomed to run at Perſons, did not charge, that the Defendant knew the Bull was accuſtomed to run at Perſons. It was holden, that the Omiſſion is not cured by a Verdict; becauſe it is an Omiſſion of that which is the Giſt of the Action. As it was not moreover neceſſary for the Plaintiff to prove, that the Defendant knew the Bull was accuſtomed to run at Perſons, it not being alledged, the Court cannot intend, that this was proved. Salk. 662. Buxendin v. Sharp. Sayer 282.

(Y) What

(Y) What Miſtake, or Omiſſion, in the Copy of the Iſſue delivered is cured by a Verdict.

1 Barn. 335. Johns v. Smith.

1. IN the firſt Count, in the Copy of the Iſſue delivered in an Action of *Aſſumpſit*, inſtead of its being alledged, that the Defendant was indebted to the Plaintiff, it was alledged, that the Plaintiff was indebted to the Plaintiff. The other Counts were right, and the Miſtake in the firſt Count was corrected in the Record of *Niſi Prius*: But it was done without Leave of the Court. A Motion being made to ſet aſide the Verdict obtained by the Plaintiff, on Account of the Variance betwixt the Copy of the Iſſue delivered and the Record of *Niſi Prius*, it was holden, that, as the Variance is not in a Thing material to the Iſſue, the Verdict is good.

MS. Rep. Mather v. Brinker. Eaſt. 4 G. 3. in C. B.

2. Upon a Rule to ſhew Cauſe, why the Verdict obtained by the Plaintiff ſhould not be ſet aſide, it appeared, that, in the Recital of the Writ in the Copy of the Iſſue delivered, the Defendant, whoſe Name was *John*, was called *James*; that in other Parts of the Copy of the Iſſue delivered he was called *John*; and that no Defence was made at the Trial. The Rule was diſcharged: And by the Court—The Variance in this Caſe is ſo immaterial, that no Advantage can be taken thereof after a Verdict.

1 Barn. 58. Scrimſhaw v. Proctor.

3. Theſe Words, *Et prædictus Querens ſimiliter*, were inſerted in the Copy of the Iſſue delivered, in the Room of the Words, *Et prædictus Defendens ſimiliter*. The Verdict was holden to be bad.

1 Barn. 333. Thompſon v. Simmons.

4. In the Copy of the Iſſue delivered the Name of the Defendant was inſerted, inſtead of that of the Plaintiff, in the joining of Iſſue; but in the Record of *Niſi Prius* the Plaintiff's Name was inſerted. A Motion was made to ſet aſide the Verdict obtained by the Plaintiff, on Account of the Variance betwixt the Copy of the Iſſue delivered and the Record of *Niſi Prius*. The Verdict was holden to be good; becauſe it was general, and there was another Iſſue which was well joined.

1 Barn. 334. Rye v. Croſſman.

5. Theſe Words, *and the ſaid Plaintiff likewiſe*, were omitted in the Copy of the Iſſue delivered. The Plaintiff obtained a Verdict: But as the Defendant relied upon the Materialty of the Omiſſion, and made no Defence at the Trial, a Rule was granted to ſhew Cauſe, why the Verdict ſhould not be ſet aſide. Upon ſhewing Cauſe it was inſiſted, that the Record of *Niſi Prius* is right, and that the Iſſue is amendable after a Verdict. The Rule was made abſolute: And by the Court—This is a material Variance, and, as the Defendant relied upon it, and did not make any Defence at the Trial, it it fatal.

2 Barn. 334. Wreathcock v. Bingham.

6. In an Action, brought by the Indorſee of a Promiſſory Note againſt an Indorſor, the Name of the Indorſor was omitted in the Copy of the Iſſue delivered, which was in theſe Words, *be the ſaid indorſed*, inſtead of theſe Words, *be the ſaid J. S. indorſed:* But the Indorſor's Name was inſerted in the Record of *Niſi Prius*. The Plaintiff obtained a Verdict: But, as the Defendant relied upon the Materiality of the Variance, and did not make any Defence at the Trial, the Verdict was ſet aſide.

1 Barn. 331. Grave v. Cliff.

7. Theſe Words, *and the ſaid Plaintiff likewiſe*, were omitted in the Copy of the Iſſue delivered: But they were inſerted in the Record of *Niſi Prius*. Upon ſhewing Cauſe to a Rule, for ſetting aſide the Verdict obtained by the Plaintiff, it appeared, that one of the Counſel for the Defendant did at the Trial object to the Sufficiency of the Plaintiff's Evidence. This, although no Witneſs for the Plaintiff was croſs examined, and although no Witneſs was called for the Defendant, was holden to be ſuch a Making of Defence at the Trial, as did cure the Omiſſion.

(Y) Of

(Z) Of divers Things, which did not fall properly under any of the foregoing Heads.

1. THE Queſtion was, whether a Verdict, which found a Deed *in hæc verba*, did find all that was recited in the Deed. It was holden that it did not. And by the Court—If it ſhould be holden, that a Verdict, which finds a Deed in *in hæc verba*, does find all that is recited in the Deed, the Jury, who are ſworn to find the Truth, would whenever there is a falſe Recital in a Deed find a Falſity. It has been obſerved, that if a Deed of Bargain and Sale, wherein the Conſideration Money is recited to have been paid, be found, it is found that the Money is paid: But the Obſervation does not apply, it not being in ſuch Caſe found, that the Conſideration Money is paid: Nor is it neceſſary, that this ſhould be found; for, if any Sum of Money be mentioned in a Deed of Bargain and Sale as the Conſideration, the Deed is good, although the Money have not been paid. Freem. 529. Blackmore v. Cumberford.

2. The Pannel of the Jury, who were to try an Indictment againſt *Willis*, was by Miſtake annexed to the *Diſtringas* upon an Indictment for the ſame Offence againſt *Brown*; and the Pannel of the Jury, who were to try an Indictment againſt *Brown*, was by Miſtake annexed to the *Diſtringas* upon an Indictment for the ſame Offence againſt *Willis*. The Verdicts found in both Caſes were holden to be bad; becauſe they were found by Juries, who had not Authority to try the Indictments. 1 Barnard. 108. Rex v. Willis and Brown. Cro. Ja. 396.

3. It is in the general true, that if the Jury do not, where Damages or Coſts ought to be aſſeſſed, aſſeſs either, or both, as the Caſe may require, the Verdict is bad. Trial per Pais 259.

4. In an Action of Annuity the Jury found, that ſo much of the Annuity as the Plaintiff claimed was in Arrear: But they did not aſſeſs either Damages or Coſts. The Verdict was holden to be defective: And it was likewiſe holden, that the Defect could not be made good, by awarding a Writ of Enquiry to aſcertain the Damages and Coſts. But if in a Caſe, wherein Damages or Coſts, or both, ought to be aſſeſſed, the Jury omit to aſſeſs either, or both, as the Caſe may require, it is in the Power of the Plaintiff to make the Verdict good, by releaſing the Damages or Coſts, or both. 2 Lill. Abr. 798.

5. The Declaration in an Action of Treſpaſs charged the ſelling of the Plaintiff's Goods. The Defendant pleaded, that the Goods, which he had diſtrained for Rent in Arrear, were purſuant to the Direction of the 2 *W. & M. c.* 5. appraiſed by two Perſons ſworn by the Headborough; and that the Surplus of the Money for which they were ſold was, after deducting the Rent and Charges of the Diſtreſs, left in the Hands of the Conſtable. The Plaintiff replied *De injuria ſua propria abſque tali Cauſa*. Iſſue being joined upon the Replication, a Verdict was found for the Defendant. The Verdict was ſet aſide; a Verdict was ordered to be entered for the Plaintiff; and a Writ of Enquiry was awarded for aſcertaining the Damages: And by the Court—The preſent Verdict ought not to ſtand; becauſe it appears from the Defendant's own ſhewing, that the ſelling of the Goods is not juſtifiable; for, as the Conſtable was preſent, the Headborough had no Power to adminiſter the Oath to the two Appraiſers. Str. 873. Broom v. Rice.

6. In an Action of Replevin, the Defendant avowed the taking of the Goods, for the Sum of thirty-ſix Pounds in Arrear for Rent. The Plaintiff, as to twelve Pounds Parcel of the thirty-ſix Pounds, pleaded Payment; and as to the Reſidue he pleaded, that it was not in Arrear. Iſſue being joined Cro Ja. 473. Dent v. Parſo.

upon both Pleas, the firſt Iſſue was found for the Plaintiff, the ſecond for the Defendant. Judgment was given for the Defendant: And by the Court—If one Iſſue in an Action of Replevin be found for the Defendant, he is intitled to a Return of the Goods; and conſequently, the Finding of another Iſſue for the Plaintiff is nugatory.

3 Lev. 254. Rex v. Hunter.

7. In an Indictment upon the Statute againſt Stabbing, tried at the *Old Bailey*, the Jury found a Special Verdict, in which the Queſtion ſubmitted to the Court was, whether the Priſoner was ouſted of the Benefit of the Clergy. The Verdict being by the Command of the King referred to the Judges, it was argued before them at *Serjeants Inn*. Six of the Judges were of Opinion, that the Priſoner was ouſted of the Benefit of the Clergy; but the other five were of a contrary Opinion; and the Recorder was likewiſe of Opinion, that the Priſoner was not ouſted of the Benefit of the Clergy. The King being himſelf of the ſame Opinion, the Priſoner had the Benefit of the Clergy.

VISNE or VENUE.

(A) Venue, what.
(B) In what Caſes Venue is neceſſary.
(C) How the Want of a Venue may be aided.
(D) What deemed a proper Laying of the Venue.
(E) From whence the Venue ſhall come.
(F) In what Caſes Venue may be changed. Wherein,

1. When the Motion for changing the Venue muſt be made.
2. The Certainty required in the Affidavit on which the Motion is made.
3. Caſes in which the Venue cannot be changed.

(A) Venue, what.

1. THE *Venue*, in Latin *Vicinetum* or *Viſnetum*, is the Place from whence a Jury are to come for the Trial of Cauſes, which is generally ſome neighbouring Place, *Locus quem Vicini habitant*, from whence it is called *Vicinetum* or *Venue*.

(B) In what Caſes Venue is neceſſary.

1. THE moſt general Rules reſpecting the Neceſſity of a *Venue* are—That a *Venue* is neceſſary in all Caſes where the Matter is traverſable, or where it affects the *Right* of the Action; where it merely regards the *Perſon*, or concerns Damages only, there a *Venue* is not neceſſary. But theſe Rules will be better underſtood by Conſideration of the following Caſes.

2. In an Action on the Caſe the Defendant pleaded in Abatement, that the Plaintiff was an Alien Enemy, and laid no *Venue*: And on Demurrer it was adjudged to have been well pleaded, and the Plaintiff might have replied, that he was born in *England* generally. But if ſuch a Matter is pleaded in Bar, it muſt be pleaded with a *Venue*, and the Plaintiff ſhould reply, that he was born in ſuch a Place in *England*, and in the principal Caſe Judgment was given, *quod billa caſſetur*. 2 Ld. Raym. 1243. Pie *v.* Cooper. The Reaſon of this Diſtinction is, becauſe that every Plea concerning the Perſon which is pleaded in Abatement is triable where the Action is brought; but where ſuch Plea is pleaded in bar of the Action the *Venue* ſhall be alledged, becauſe ſuch Plea is not to the *Perſon* but to the *Right*. 2 Ld. Raym. 853. Weſt *v.* Sutton.

3. Matters

2 Ld.Raym. 1172, 1173. Scawen v. Garret.

3. Matters touching the Perſon, as Privilege of Attorney, may be pleaded without a *Venue*, and be tried where the Writ is brought.

Per Cur. Carth. 256. Huckle v. Wye.

4. In Covenant againſt one as Aſſignee, there is no need of laying any *Venue*, becauſe an Aſſignment is always intended to be made on the Lands aſſigned.

Cro. Eliz. 880. The Lady Shandos v. Simpſon.

5. But a Conſideration executory is *traverſable*, and therefore a *Venue* muſt be laid.

1 Lutw. 235. Remington v. Tailor.

6. Where the Judgment is upon a *Nil dicit*, the want of a *Venue* is not material to ſet it aſide, becauſe the Inquiry is not to be of any Thing beſides Damages, which may be inquired by any Jurors in the County.

(C) How the Want of a Venue may be aided.

6 Mod. 222. Boiſloe v. Bailey. 3 Salk. 381. Anonymus.

1. IT is a general Principle, that the Want of a *Venue* is only curable by ſuch Plea as admits the Fact for the Trial whereof it was neceſſary to lay a *Venue*: Or by a Verdict.—Thus the

2 Ld.Raym. 1039. Purſlow v. Bailey.

2. Want of a *Venue* is aided by pleading over; as where in Treſpaſs the Defendant pleaded a Submiſſion to an Award, and that an Award was made, which he had performed, but laid no *Venue* where the Performance was. The Plaintiff replied another Award, and the Defendant tendered Iſſue upon it, whereupon Plaintiff demurred. *Holt* Ch. J. ſaid, That the Want of a *Venue* was aided by the pleading over.

2 Ld.Raym. 1040. Purſlow v. Baily.

3. So in Debt upon Bond, though no *Venue* is laid where the Bond was made, yet if the Defendant pleads a Releaſe, this admits the Bond, and aids the Want of a *Venue*; *per Holt* Ch. J. But if Defendant had demurred, the Want of a *Venue* had been ill.

16 & 17 Car. 2. c. 8. 1 Saund. 246. Craft v. Boite, S. C. Raym. 181.

4. By the 16 & 17 *Car.* 8. the Want of a *Venue* is aided after Verdict; and this in Caſes not only where there is a wrong *Venue*, but alſo where the Cauſe is tried in a wrong County, as appears from the Caſes in the Margin, by the Name of *Craft* v. *Winter*. And it is there added, that the Defendant might have demurred upon it.

(D) What deemed a proper Laying of the Venue.

4 & 5 Ann c. 16. and ſee 24 Geo. 2. c. 18. which extends this Act to Trials of Iſſues on penal Statutes.

1. MANY Niceties which were formerly to be obſerved with reſpect to the laying the *Venue*, are now removed by the 4 & 5 *Ann. c.* 16. which enacts, "That every *Venire facias* for the Trial of any Iſſue in any "Action or Suit, ſhall be awarded of the Body of the proper County where "ſuch Iſſue is triable." For Example,

1 Barnes's Notes in C. B. 342. Spooner v. Milward.

2. The *Venue* in the Declaration was laid at *Leek*, and not at *Leek* in the County aforeſaid. Defendant demurred, and ſhewed the Want of a proper

proper *Venue* for Cauſe, Plaintiff joined in Demurrer, and upon Argument the Court gave Judgment for the Plaintiff. It was held ſufficient according to the Courſe of the Court to lay the *Venue* at *Leek*, which has Reference to the County in the Margin; and ſince by Act of Parliament the *Venire facias* is to be awarded *de corpore Comitatas*, it is not neceſſary that any particular Place in the County be laid.

3. It is a general Rule likewiſe, that the County in the Margin of a Declaration will help the Venue laid in the Body of it, but will not hurt it; as appears from the following Caſe.

4. In the Margin ſtood the Word *Norfolk*, in the Body of the Declaration the *Venue* was laid at the City of *Norwich*, in the County of the ſame City throughout. The Plaintiff executed a Writ of Inquiry of Damages directed to the Sheriffs of the City of *Norwich*. Had no *Venue* been laid in the Body of the Declaration, Reference muſt be had to the Margin, but where a proper *Venue* is laid in the Body of the Declaration, *the Word in the Margin ſhall not vitiate it*, for it is a *Jeofail* which is helped by the 4 & 5 *Ann. c.* 16. 1 Barnes's Notes in C. B. 245. Howſe *v.* Hatelwood.

5. It is to be obſerved however, that in all *real* Actions the *Venue* ought to be laid in that County where the Thing is for which the Action is brought; for being *local*, it is only triable there; whereas Matters which are *tranſitory* may be tried in any County, as will more particularly appear, when we come to conſider in what Caſes the *Venue* may be changed. So likewiſe, 2 Lill. Abr. 782.

6. In an Action of Debt brought for Rent due for Land upon a Leaſe under Hand and Seal, where there is no Privity of Contract, as againſt an Aſſignee, &c. the *Venue* muſt *not* be laid out of the County where the Land lies for which the Rent is due: for the Action is, for want of Privity of Contract, become a *local* Action, *ratione terræ*, out of which the Rents are iſſuing, and *not tranſitory*: But where the Action is brought by the Leſſor againſt the Leſſee, there being Privity of Contract, the Action is *tranſitory*, and the Demiſe may be laid to be made in any other County than that where the Land lies. 2 Lill. Abr. 782, 783.

7. With reſpect to criminal Caſes it is ordained by the Stat. 21 *Jac.* 1. *c.* 4. that all Informations on penal Statutes ſhall be laid in the Counties where the Offences were committed. And upon this Statute the following Points have been adjudged. 21 Jac. c. 4.

8. In an Information on the 5 & 6 *Ed.* 6. *c.* 14. for buying and ſelling of live Cattle contrary to the Statute, it was inſiſted that the Information ought to have been brought in *Norfolk* where the Offence was committed, and not in *Middleſex*. And *Holt* Chief Juſtice ſaid, that ten Judges had agreed in the following Reſolutions.

9. Firſt, That the 21 *Jac. c.* 4. does not extend to any Offence created *ſince* the Statute, ſo that Proſecutions on ſubſequent penal Statutes are not reſtrained thereby, but that Statute is as to them, as it were repealed *pro tanto*. 1 Salk. 372, 373. The King *v.* Gaul.

10. Secondly, That all Informations, and popular Actions on penal Statutes made *before* that Act, muſt by Force of 21 *Jac.* 1. *c.* 4. be laid, brought and proſecuted in the proper County where the Fact was done. Again,

11. An Information was laid on the 12 *Car.* 2. *c.* 32. for carrying Wool on board in order to export it; and it was objected, that it ought to have been laid where the Offence was committed. But the Lord Chief Baron ſaid, That

12. The Statute *Jac.* 1. does not extend to any Offence created ſince; and therefore it muſt now ſtand on the Statute *Car.* 2. there are no negative Words Bunb. 236. Attorney General *v.* Browſe.

But ſee 4 Inſt. 173. where Lord *Coke* in his Comment on this Act ſays, that it is but in Affirmance of the true Inſtitution of the Common Law: For *Vicini viciniora Facta præſumuntur ſcire.*

Words in it, ſo it does not take away the Prerogative of the Crown to lay it any where, and this at the Common Law would be *tranſitory*; and he over-ruled the Objection.

22 Jac. 1. c. 12. for the Conſtruction on this Act, ſee Vaughan 113. and *ſequent.*

13. It is ordained likewiſe by the Statute 21 *Jac.* 1. *c.* 12. that all Actions brought againſt any Officers of Juſtice ſhall be laid in the County where the Fact was committed.

14. It is obſervable however, that the Action is only confined to the proper County where the Officer is acting in Execution of his Office. 1 *Str.* 446. *Anonym'.*

(E) From whence the Venue ſhall come.

1 Inſt. 125. a. 4 & 5 Ann. c. 16. 24 Geo. 2. c. 18. Before theſe Statutes, where the Venue could not come from a Vill, Hamlet, or Lieu Conus, there it might have been *de corpore Comitatus.*

1. THE general Rule of Law as laid down by Lord *Coke* is, that every Trial ſhall be out of that Town, Pariſh or Hamlet, or Place known out of the Town, *&c.* within which the Matter of Fact iſſuable is alledged, that is moſt certain and neareſt thereunto, the Inhabitants whereof may have the better and more certain Knowledge of the Fact. But the Learning on this Head is greatly abridged by the Stat. 4 & 5 *Ann. c.* 16. and 24 *Geo.* 2. *c.* 18. which are taken Notice of under the laſt Head. For by theſe Statutes it is enacted, That every *Venire facias* for the Trial of any Iſſue in any Action or Suit, or upon any penal Statute, ſhall be awarded of the Body of the proper County where ſuch Iſſue is triable. It may therefore be ſufficient to conſider,

2 Lill. Abr. 786.

2. Out of what County the *Viſne* ſhall come, where Part of the Matter to be tried is Part in one County and Part in another.

3. This will depend on the Gift of the Iſſue, as may be collected from the following Caſes.

Br. Viſne, pl. 94.

4. An Action was brought for Goods eſloined, and received by the Defendant, and the Tort of the eſloining is alledged in one County, and the Receipt of them by the Defendant in another County, and they are at Iſſue if he receive them or not; there the *Viſne* ſhall be of the County where the Receipt is ſuppoſed.

Br. Viſne, pl. 117. It may be added as a general Rule that in all Caſes where the

5. In Treſpaſs, the Defendant aſſumed in *London* to cure the Wound of the Plaintiff, *&c.* and applied contrary Medicines in *Middleſex*, by which the Plaintiff was impaired. *Per Thirn.* If they take Iſſue upon the *Aſſumpſit*, *Viſne* ſhall be of *London*, and if of the contrary Medicines then of *Middleſex.*

Action is founded upon two Things, both of which are material or traverſable, and the one without the other will not maintain the Action, there the Plaintiff may bring the Action, in which of the Counties he will. 7 Rep. 2. a. Bulwer's Caſe

6. In ſome Caſes however, the *Venue* ſhall come out of both Counties. For which, ſee *Br. Confeſſ. & Avoid. pl.* 30. or 38 *H.* 6. *p.* 25. where the Caſe is more full and correct.

2 Roll. Abr. 603. pl. 8.

7. But where both Counties cannot join, there it is ſaid, it may be tried in either County.

(F) In

(F) In what Cases the Venue may be changed.

1. THE general Principles with reſpect to the changing of the *Venue* may be found under *Actions local and tranſitory*. [B]. It may be neceſſary however to conſider farther.

1. When the Motion for changing the Venue muſt be made.

2. It has been held that the Defendant muſt move to change the *Venue* before he pleads; and that the Plaintiff in like Manner muſt move to diſcharge the Rule, on his Undertaking to give material Evidence, before Defendant replies. But — 2 Str. 858. Dickenſon v. Fiſher.

3. A Judge's Summons or Order for Time to plead, ſhall be no Bar to a Motion for changing the *Venue*. So likewiſe, — Per Cur. 2 Barnes's Notes 387. Dennis v. Fletcher.

4. Where after a Rule to ſhew Cauſe why the *Venue* ſhould not be changed, and before it was made abſolute, the Defendant by Inadvertence put in a Plea, yet the Court held that this was no Waiver of the Rule: And they allowed Defendant to withdraw his Plea on Payment of Coſts, and made the Rule abſolute for changing the *Venue*. — 2 Barnes's Notes 392. Herbert v. Flower et al'.

5. Neither is a Judge's Order for an Imparlance, any Bar to a Motion for changing the *Venue*. — 1 Barnes's Notes 350. Blackſtock v. Payne.

2. The Certainty required in the Affidavit on which the Motion is made.

6. With reſpect to the Affidavit it muſt be poſitive and certain. It is not ſufficient that it be affirmative, but it muſt alſo contain negative Words; that is, it is not enough for Defendant to ſwear that the *Cauſe of Action*, if any, did ariſe in the County to which he would have the *Venue* changed, but he muſt likewiſe add that it did *not* ariſe in the County laid in the Declaration, or *elſewhere* out of the County to which he would have the *Venue* changed. — 1 Barnes's Notes 338. Belſhaw v. Porter. The Words *Cauſe of Action* are indiſpenſably neceſſary; for it would be inſufficient to ſwear that the Promiſes in the Declaration were made in ſuch a County. 1 Barnes's Notes 336. Cole v. Gouing, S P. 2 Bernardiſt. 74. White v. Love.

7. Where there are ſeveral Defendants the Affidavit of one is ſufficient to ground a Motion for changing the *Venue*. — 1 Barnes's Notes 343. Box v. Read. and another.

3. Caſes in which the Venue cannot be changed.

8. With regard to the Caſes in which the *Venue* cannot be changed, though it has been held that the *Venue* may be changed in all Actions of a tranſitory Nature, yet there are divers Exceptions, as in Caſes of Privilege, Specialty, Promiſſory Note or Bill of Exchange. To which may be added, that even in the Caſe of Perſons privileged in this Reſpect, ſuch as Barriſters or Attornies, if they are joined in an Action with unprivileged Perſons, they cannot change the *Venue*. — Per Cur. 2 Barnes's Notes 391. Everett v. Sanſum. 1 Str. 610. Townſend v. Duppa & al'.

9. Neither is the *Venue* in any Caſe ever changed into a *County Palatine*. The Court have likewiſe refuſed changing it into *Durham*: And have alſo rejected a Motion for changing it from *Yorkſhire* into the City of *York*. — 2 Barnes's Notes 386. Richardſon v. Walker. & al'. Id. Ibid. Lewis v. Aſkham. 1 Barnes's Notes 341. Craſter v. Cockerell.

UNIVERSITIES.

(A) Universities, what.
(B) Of their Courts and Privileges of Jurisdiction. Wherein,

1. How they are to demand Conusance.
2. By whom it may be demanded.
3. At what Time it may be demanded.

(C) Of their Privileges with regard to their Right of Presentation to the Livings of Papists. Wherein,

1. In what Cases they shall present.
2. Whom they shall present.
3. How their Right of Presentation may be prevented.
4. How Trusts made to prevent their Right of Presentation may be discovered.
5. How their Right of Presentation may be devested.
6. How it may be avoided.

(A) Universities, what.

1. BY Universities in general, we understand those Seminaries of Learning where Youth are sent to finish their Education, and to be instructed in the liberal Sciences. With us, by Universities, are more particularly denoted those two learned Bodies of *Oxford* and *Cambridge*, which are invested with several peculiar Privileges.

(B) Of their Courts and Privileges of Jurisdiction.

4 Inst. 227. Godb. 201. pl. 287. Archbishop of York v. Sedwick.

1. EACH of the Universities had several Powers and Privileges by Charters from the Kings of this Realm, particularly one in the Eighth of *Hen.* 4. whereby they were authorized to hold Plea of all Causes arising within the University according to the Course of the *Civil Law*: But in the Opinion of all the Judges of *England* the Grant was held not to be good, for that the King could not by his Grant alter the Law of the Land. To remedy this and other Defects respecting their Powers and Privileges, a special

a ſpecial Act of Parliament was made in the 13 *Eliz.* confirming all former Letters Patent, and all Manner of Liberties, Franchiſes, *&c.* which they had held, or of Right ought to have enjoyed, *&c.*

2. By Letters Patent (not confirmed by Parliament) dated 30 *March* 11 *Car.* 1. granted to the Univerſity of *Oxford*, their old Privileges are explained, and larger granted. 1 Mod. 164. Magdalen College Caſe. Wood's Inſt. 548

3. Their Courts are called the *Chancellors* Courts. The Chancellors are uſually Peers of the Realm, and are appointed over the whole Univerſity. But the Courts are kept by their Vice-Chancellors, their Aſſiſtants or Deputies; the Cauſes are managed by Advocates or Proctors. Id. Ibid. By Charter of 14 Hen. 8. The Chancellor, his Commiſſary,

and his Deputy that is the Pro-Vice Chancellor, are Juſtices of the Peace for the Vill of *Oxon*, *County of Oxon* and *Berks*; and their Authority does not depend on the common Commiſſion only; they being Juſtices of the Peace by Virtue of their Offices.

4. Theſe Courts have Juriſdiction in all Cauſes Eccleſiaſtical and Civil (except Mayhem, Felony and Freehold) where a Scholar, Servant or Miniſter of the Univerſity is one of the Parties in Suit. Id. Ibid & Cro. Car 73. Wilcocks *v.* Bradell. But ſee the

Petition againſt the Grant of *Hen.* 4. in *Prynn's Animadv.* p. 368, 369.

5. Their Proceedings are in a ſummary Way according to the Practice of the Civil Law; and in their Sentences they follow the Juſtice and Equity of the Civil Law, or the Laws, Statutes, Privileges, Liberties and Cuſtoms of the Univerſities, or the Laws of the Land at the Diſcretion of the Chancellor. Cro. Car. 73. Wilcocks *v.* Bradell. Hetley 25. Thomas Wilcocks's

Caſe. Hard. 508. Caſtle v. Litchfield.

6. If there is an erroneous Sentence in the Chancellor's Court of the Univerſity of *Oxford*, an Appeal lies to the Congregation, thence to the Convocation, and from thence to the King in Chancery, who nominates Judges Delegates to hear the Appeal. The Appeal is of the ſame Nature in *Cambridge*. Wood's Inſt. 549. 2 Ld. Raym. 1346. The King *v.* the Chancellor, &c. of Cambridge.

7. As by Charter confirmed, as above mentioned, by Act of Parliament, Cognizance is granted to the Univerſity of all Suits ariſing any where in Law or Equity againſt a *Scholar*, *Servant* or *Miniſter* of the Univerſity, depending before the Juſtices of the *King's Bench*, *Common Pleas* and others there mentioned, and before any other Judge, though the Matter concern the King: If an *Indebitatus Aſſumpſit* is brought by *Quo minus* in the *Exchequer* againſt a Scholar or other privileged Perſon, the Univerſity ſhall have Conuſance, for the Court of *Exchequer* is included in the general Words. Cro. Car. 73. Wilcocks *v.* Bradell. Hard. 505, 508. Caſtle *v.* Litchfield. There is ſome Diſagreement in the Books as to the Recital of

this Charter; in *Cro. Car.* they are ſaid to have Conuſance, *Ita quod Juſticiarii de Banco Regis ſive de communi Banco, vel Juſticiarii de Aſſiſis non ſe intromittant.* In *Hard.* it is ſaid, that Conuſance is given them of all Suits, *&c.* depending before the Juſtice of the *King's Bench*, *Common Pleas*, and others there mentioned, and before any other Judge, *though the Matter concern the King.* Theſe latter Words would no Doubt warrant the Reſolution in the Caſe of *Caſtle* v. *Litchfield*, for it is ſaid that no Charter of Exemption ſhall be allowed without theſe or the like Words, *Licet tangat nos.* But ſee *Hardr.* 189 where it is affirmed that the Exemption granted to the Univerſity hath not theſe Words, *Licet tangat nos.* And ſee the following Authorities, by which it is held, in Oppoſition to the Caſe of *Caſtle* v *Litchfield*, That—

8. If a Debtor and Accountant to the King ſues a Scholar by Bill in Equity in the *Exchequer*, or if an Attorney ſues a Scholar by Writ of Privilege, it is ſaid that the Univerſities ſhall not have Conuſance, for a general Grant ſhall not take away the ſpecial Privilege of any Court. Hard. 189. Wilkins *v.* Shalcroft. Lit. Rep. 304. Oxford

Letters Patent S. P. 3 Leon. 149. The Lord Anderſon's Caſe. 2 Danv. Abr. 164.

But

Cro.Car.75. Wilcocks *v.* Bradell. Hetl. 28. Thomas Wilcocks's Caſe. 9. But in Caſes where Privilege is allowable, a Scholar, *&c.* cannot waive his Privilege, and have a Prohibition in the Courts of *Weſtminſter*, for the Univerſity by Right has the Conuſance of the Plea, where one is a privileged Perſon; and a Stranger is forced to ſue a privileged Perſon in their Courts by reaſon of that Right veſted in them.

This Privilege was granted to Scholars, that their Studies might not be interrupted by their being forced to attend Suits in other Courts.

Hetl. 28. Thomas Wilcocks's Caſe. 10. But a Scholar ought to be reſident in the Univerſity at the Time of the Suit commenced; and no other ought to be joined in the Action with him, for in ſuch Caſes, he ſhall not have Privilege.

Brownl. 74. Carrell *v.* Paſke. 11. Though it is ſaid that Servants of the Univerſity are privileged, yet it has been held that a Bailiff of a College was not capable of Privilege.

2 Vent. 106. The City of Oxford's Caſe. 12. Neither is a Townſman intitled to Privilege, to exempt him from an Office in the Town, if he keeps a Shop and follows a Trade, though he is matriculated as Servant to a Scholar.

Cro.Car. 87, 88. Hayley's Caſe. Litt. Rep. 252. Cripps *v.* Webb's Caſe. 13. It is to be obſerved, that though *Mayhem*, *Felony* and *Freehold* appear as above, to be the only Cauſes excepted in their Charter; yet it has been held that in Actions for the Recovery of the Poſſeſſion of a Term, without claiming Title to the Freehold, they ſhall have no Privilege, becauſe the Freehold may come in Queſtion.

14. It hath been diſputed how far the Words of the Grant intitled them to Privilege in Matters of Equity. And the general Principle of Conſtruction ſeems to be that where Chattels only are concerned, or where Damages only are to be given, that their Privilege is allowable, but where the Suit is for the Thing itſelf, there their Privilege cannot be allowed. As in the following Caſes.

2 Ventr. 362. Draper *v.* Crowther. 15. A Bill was brought ſetting forth a Contract under Seal with the Defendant, for making a Leaſe of certain Lands in *Middleſex*, and to have Execution of the Agreement. The Defendant pleaded the Privilege of the Univerſity, to proceed in all Quarrels in Law and Equity, except concerning Freehold; and concluded to the Juriſdiction of the Court. But Lord Keeper *Guilford* over-ruled the Plea, becauſe in this Caſe they can only excommunicate or impriſon, but cannot ſequeſter Lands in *Middleſex*, and ſo can give no Remedy; and becauſe the Charter of the Univerſity of *Oxford*, impowering them to proceed in all Pleas and Quarrels in Law and Equity, *&c.* ought properly to be extended to Matters at Common Law only, or to Proceedings in Equity that might ariſe in ſuch Caſes, and not to mere Matters of Equity, which are originally ſuch, as to execute Agreements in Specie.

Fin. R. 45. Williams *v.* Roberts. 16. So likewiſe on a Bill in Chancery to be relieved againſt a Bond of the Penalty of 100*l.* given by the Plaintiff's Father to the Defendant, who pleaded his Privilege, that he is a Doctor in Divinity, Scholar and Reſidentiary Student in the College of *Oxford*, and that he ought not to be ſued but before the Chancellor of that Univerſity, or his Deputy or Commiſſary for the Time being; the Plea on Debate was over-ruled.

Fin. Rep. 162. Buſby *v.* Croſs. 17. But on a Bill to have a Bond delivered up of 100*l.* Penalty, the Money being paid, Defendant pleaded that he was a privileged Perſon of the Univerſity of *Oxford*, *viz.* a Doctor of Laws, and Reſident there, which the Chancellor certified, and demanded Conuſance of the Matter in Queſtion as determinable before him, or before the Vice-Chancellor, *&c.* and not elſewhere. The Court diſmiſſed the Bill and allowed the Plea.

Fin. Rep. 292. Powell *v.* Hine and Adams. 18. So likewiſe on a Bill by Adminiſtrator for an Account of Inteſtate's Eſtate which Defendants had got in their Poſſeſſion, on Pretence of ſome Debts due to them from the Inteſtate; Defendants pleaded they are privileged Perſons of the Univerſity of *Oxford*, and there Reſident; W

the Chancellor certified, and demanded Conuſance of the Matter as examinable before him, his Vice-Chancellor, &c. and not elſewhere. And the Plea was allowed.

19. Laſtly, on a Bill brought in this Court for a Diſcovery of the perſonal Eſtate of Dr. *Aldridge* deceaſed, and an Injunction granted thereupon, the Univerſity of *Oxford* claimed *Conuſance* of the Cauſe, for that both Plaintiff and Defendant were Scholars of the Univerſity. And *Harcourt* C. ordered the Bill to be diſmiſſed, and allowed an excluſive Conuſance in Equity *touching Chattels* to the Univerſity.

Per Harcourt Chanc. M. S. Rep. Trin. 12 Ann. in Chanc. Alderidge *v* Stratford. Vin. Abr. V. 22. p. 11.

20. It is ſaid, that the Chancellor of the Univerſity of *Oxford*, or his Vice-Chancellor, may inflict Eccleſiaſtical Cenſures of the greater Excommunication on Offenders even for Temporal Offences, and certify the Excommunication into the High Court of Chancery to obtain the Writ *De Excommunicato capiendo*, as if the Offender had been excommunicated in an Eccleſiaſtical Cauſe and certified by a Biſhop. The Univerſity of *Cambridge* hath alſo this Privilege.

Wood's Inſt. 549.

21. In the Conſtruction of their Privileges with reſpect to the Aſſize of Beer and Ale, it has been conteſted that they have not *aſſiſam ipſam*, that is, They cannot appoint another Aſſize than what is ſet down by Statute, but that they have only *Cuſtodiam Aſſize*, that is, a Power to enforce the Execution of it, as well in the Price as in the Meaſure.

3 Leon. 214. But ſee 12 W. 3. c. 11. ſec. 19. which recognizes the Right of the two Univerſities to ſize and mark Meaſures for Ale and: And by a Grant of the 29th Ed. 3. The Univerſity of Oxford hath the Aſſize and Eſſay of Wine and Ale, as well as the Cuſtody of it. Wood's Inſt. 550.

22. Such are their general Privileges of Juriſdiction; it remains now to conſider,

1. How they are to demand Conuſance.

23. It is ſaid that Conuſance may be demanded by *Certificate* only, without ſpecial Pleading upon an *Indictment* of a privileged Perſon for an Aſſault and Battery.

Wood's Inſt. 550.

24. But it has been held, that the Claim of Conuſance ought to be entered upon a Roll, and an Affidavit made to verify the Certificate.

2 Str. 810. Paternoſter *v.* Graham. PerCur. S. P. 1 Barnard. 49, 65. under the Name of Boot and Graham.

25. In Equity however a Bill being filed againſt Defendant, a Fellow of *Exeter* College in *Oxford*, for an Account of ſeveral Sums of Money; the Chancellor of *Oxford claimed* Privilege by Inſtrument in Writing. But the Lord Keeper diſallowed the Claim, ſaying it muſt be put in by way of Plea. He declared nevertheleſs that it ſhould *not* be on Oath, but that it ſhould be ſufficient to aver the Defendant to be a Scholar Reſident, &c.

1 Caſes in Chan. 237. Prat *v.* Taylor, Lord Keeper added that in Caſe of Outlawry Defendant ſhould not be put to aver the Plea on Oath.

26. In ſome Caſes the Claim of Conuſance by Plea ought to conclude with a Traverſe, as in Treſpaſs for an Aſſault and Battery at *B.* in *Com. Hertford*, the Defendant pleads, that he was Servant to a Scholar in Saint *John*'s College *Cambridge*; and that they are to have Conuſance there. The Plaintiff demurs becauſe the Defendant takes no *Traverſe*, that he was culpable in any Place *Extra Univerſitatem Cantabrigiæ*; that thereupon they might have taken Iſſue. The whole Court were clearly of Opinion, that the Defendant here ought to have concluded his Plea with a Travreſe.

3 Bulſt. 282. Payn *v.* Worth.

2. By

2. By whom it may be demanded.

Hard. 505, 510. Caſtle v. Litchfield. 2 Danv. Abr. 174.

27. The Vice-Chancellor by his Attorney or Deputy appointed in Writing may demand it, though the Vice-Chancellor is but a Deputy himſelf; for a Bailiff may properly demand Conuſance, and upon Notice of the Patent the Court ought to ſuperſede.

3. At what Time it may be demanded.

28. The Rule is that Conuſance muſt be demanded the firſt Day. Thus

2 Ld. Raym. 1339 in Caſe of the King v. Cambridge Univerſity, alias Dr. Bentley's Caſe, cited

29. In an Action on the Caſe againſt a Member of the Univerſity, the Bill was of *Eaſter* Term 11 *Ann.* and the Defendant had an Imparlance till the firſt Day of *Trinity* Term following; after which, and before Plea pleaded, the Univerſity of *Cambridge* by their Attorney demanded Conuſance, and the Claim was diſallowed becauſe it was not made the firſt Day.

as ſo held Hil. 11 Ann. B. R. Perne v. Manners.

(C) Of their Privileges with regard to their Right of Preſentation to the Livings of Papiſts.

1. In what Caſes they ſhall preſent.

3 Ja. 1. c. 5.

1. ENACTS, That every Papiſt Recuſant Convict during the Time that he ſhall remain a Recuſant Convict, ſhall from and after the End of this preſent Seſſion of Parliament be diſabled to preſent to any Benefice or Eccleſiaſtical Living, or to nominate to any Free School, Hoſpital or Donative; and ſhall likewiſe be diſabled to grant any Avoidance to any Benefice.

S. 19.

2. The Chancellor and Scholars of the Univerſity of *Oxford* ſhall have the Preſentation, *&c.* to every ſuch Benefice, School, Hoſpital and Donative, in the Counties of *Kent*, *Middleſex*, *Suſſex*, *Surry*, *Hampſhire*, *Berkſhire*, *Buckinghamſhire*, *Glouceſterſhire*, *Worceſterſhire*, *Staffordſhire*, *Warwickſhire*, *Wiltſhire*, *Somerſetſhire*, *Devonſhire*, *Cornwall*, *Dorſetſhire*, *Herefordſhire*, *Northamptonſhire*, *Pembrokeſhire*, *Carmarthenſhire*, *Brecknockſhire*, *Monmouthſhire*, *Cardiganſhire*, *Montgomeryſhire*, the City of *London*, and in every City and Town being a County of itſelf, within the Limits of the Counties aforeſaid.

S. 20.

3. The Chancellor and Scholars of the Univerſity of *Cambridge* ſhall have the Preſentation, *&c.* to every ſuch Benefice, School, Hoſpital and Donative in the Counties of *Hertfordſhire*, *Cambridgeſhire*, *Huntingtonſhire*, *Suffolk*, *Norfolk*, *Lincolnſhire*, *Rutlandſhire*, *Leiceſterſhire*, *Derbyſhire*, *Nottinghamſhire*, *Shropſhire*, *Cheſhire*, *Lancaſhire*, *Yorkſhire*, *Durham*, *Northumberland*, *Cumberland*, *Weſtmoreland*, *Radnorſhire*, *Denbyſhire*, *Flintſhire*, *Carnarvonſhire*, *Angleſey*, *Merioneth*, *Glamorganſhire*, and in every City and Town, being a County of itſelf, lying within the Limits of the Counties laſt mentioned.

4. By the 1 *W. & M. cap.* 26. *ſ.* 2. every Perſon refuſing to make, or to appear for the making the Declaration againſt Tranſubſtantiation, and whoſe Name ſhall be recorded at the Quarter Seſſions, is diſabled to make any Preſentation, Donation or Grant of Avoidance of any Eccleſiaſtical Living,

Living, as fully as if he were a Popiſh Recuſant Convict, and the Chancellor, &c. of the Univerſities ſhall have the Preſentation in the reſpective Limits mentioned in the Act of 3 *Jac.* 1. *c.* 5.

5. And farther by 12 *Ann. c.* 14. Papiſts and their Children under the Age of 21 Years, not being Proteſtants, though not convicted, and their Mortgagees and Truſtees ſhall loſe their Preſentations; and the reſpective Univerſities ſhall preſent.

2. Whom they ſhall preſent.

6. By 3 *Jac.* 1. *c.* 5. *ſ.* 21. It is provided, that neither of the Univerſities ſhall preſent to any Benefice, any ſuch Perſon as ſhall then have any other Benefice with *Cure of Souls*; and ſuch Preſentation ſhall be void.

It was agreed that a Layman may be preſented to a Prebend, for *non habet curam Animarum*, Cro. Eliz. 79. And for the ſame Reaſon a Dean, Archdeacon, Prebendary, &c. may be preſented or nominated by the Univerſity; for their Promotion is not a Benefice with Cure of Souls. Vin. Abr. V. 2. p. 5. But ſee 3 Inſt. 155. *contra.*

3. How their Right of Preſentation may be prevented.

7. If Patron Recuſant grants the Patronage in Fee to another, in ſuch Caſe the Univerſity ſhall not have the Preſentment; and in the ſame Manner, if he grants it in Tail for Life or Years, during the Continuance of this Grant, he is not Patron in Poſſeſſion, and therefore the Univerſity ſhall not preſent by the Words of the Statute of 3 *Jac. c.* 5.

Sir William Jo. 19. Standen *v.* The Univerſity of Oxford and Whitton.

8. But if a Patron makes a Leaſe for Years of an Advowſon, and afterwards becomes a Recuſant, the Univerſity ſhall have the Preſentation, as a future Intereſt given to them.

Sir William Jo. 26. Standen *v.* Univerſity of Oxford and Whitton S. P. Arg. 10 Rep 56. a.

9. So likewiſe if a Patron acknowledges a Statute Merchant, and after becomes Recuſant Convict, and then the Statute is extended, the Univerſity notwithſtanding ſhall have the Preſentment.

Id. ib.

4. How Truſts made to prevent their Right of Preſentation may be diſcovered.

10. Where ſecret Truſts are made to prevent their Right of Preſentation, the following Statutes point out a Method for diſcovering ſuch Truſts.

11. By 1 *W. & M. c.* 26. *ſ.* 3. Truſtees of Recuſants are diſabled to preſent or grant any Avoidance of any Eccleſiaſtical Living, Free School or Hoſpital, and the reſpective Univerſities are to have the Preſentations.

12. And if any Truſtee, Mortgagee or Grantee of any Avoidance ſhall preſent, &c. to any ſuch Eccleſiaſtical Living, &c. where the Truſt ſhall be for any Recuſant Convict, or diſabled, without giving Notice of the Avoidance in Writing to the Vice-Chancellor of the Univerſity, to whom the Preſentation ſhall belong, within three Months after the Avoidance, he ſhall forfeit 500*l.* to the Univerſity to which the Preſentation, &c. ſhall belong.

13. *S.* 7. Perſons making the Declaration, and taking the Oaths before the Juſtices at the Quarter-Seſſions, where their Names are recorded, ſhall be diſcharged of the Diſability.

14. Farther by 12 *Ann. ſt.* 2. *c.* 14 *ſ.* 2. Preſentor is to be examined by the Ordinary, whether he be a Papiſt or a Truſtee for ſuch.

15. *S.* 3. Preſentee is to be examined upon Oath by the Ordinary, if he know or believes the Preſentor to be a Papiſt, or a Truſtee for a Papiſt,

piſt, or for the Children of ſuch, or any other Perſon; and if he anſwers not directly, the Preſentation to be void.

16. *S.* 4. Univerſities and their Preſentees may bring a Bill in Chancery for Diſcovery, and upon neglecting to anſwer, the Bill to be taken *pro confeſſo*.

It was moved in a *Quare Impedit*, that the Plaintiff claiming Right of Patronage might be examined

17. *S.* 5. Patrons and their Clerks, conteſting the Right of the Univerſity in *Quare Impedit*, may be examined in Court, or by Commiſſion or Affidavit, as the Court ſhall think proper, as to ſecret Truſts; and if upon Diſcovery who is the *Ceſtui que Truſt*, he ſhall, upon a Rule made for him to come into Court, or before Commiſſioners, to make the Declaration againſt Tranſubſtantiation, neglect ſo to do, he ſhall be eſteemed Convict in reſpect to his Preſentation.

upon Oath touching ſecret Truſts for Papiſts purſuant to this Act, and a Commiſſion for ſuch Examination was ordered to iſſue, directed to the three Prothonotaries or any two of them. 1 *Barnes's Notes* 2 *King* v. *Biſhop of* Carliſle, *and Maſters and Scholars of the Univerſity of* Cambridge. See likewiſe where the Court ordered a Commiſſion for the like Purpoſe, and directed the Prothonotary to ſtrike the Commiſſioners Names, and to ſettle the Interrogatories. 2 *Barne's Notes* 1. *Rutter* v. *Biſhop of* Hereford *and the Univerſity of* Cambridge.

18. *S.* 6. And the Anſwer of ſuch Patrons, and the Perſons for whom they are intruſted, and his and their Clerks, and their Examinations and Affidavits taken as aforeſaid by order of any Court, or by the Ordinary, ſhall be allowed as Evidence againſt ſuch Patron ſo preſenting, and his Clerk.

19. *S.* 8. No Lapſe ſhall incur, nor Plenarty be a Bar, till three Months after the Anſwer put in, or the Bill taken *pro confeſſo*, or the Proſecution deſerted, provided ſuch Bill be exhibited before any Lapſe incurred.

20. *S.* 10. Upon Confeſſion or Diſcovery of Truſt, Deeds may be inforced to be produced.

21. Laſtly, The 11 *Geo.* 2. *c.* 17. *ſ.* 5. Enact, That every Grant of any Advowſon of any Eccleſiaſtical Living, School, Hoſpital or Donative, and every Grant of any Avoidance thereof, by any Papiſt or Perſon making Profeſſion of the Popiſh Religion, or any Mortgagee or Perſon intruſted for any Papiſt, *&c.* ſhall be void, unleſs ſuch Grant ſhall be made *bona fide*, and for a full Conſideration, to a Proteſtant Purchaſer, and only for the Benefit of Proteſtants; and ſuch Grantee ſhall be deemed a Truſtee for a Papiſt, and they and their Preſentees ſhall be compelled to make ſuch Diſcovery relating to ſuch Grants and Preſentations as by the Act 12 *Ann. ſt.* 2. *c.* 14. is directed. And every Deviſe to be made by any Papiſt of any ſuch Advowſon, *&c*, with Intent to ſecure the Benefit thereof to the Heirs or Family of ſuch Papiſt, ſhall be void; and ſuch Deviſees and Perſons claiming under ſuch Deviſees, and their Preſentees, ſhall be compelled to diſcover whether ſuch Deviſees were not made with the ſaid Intent.

5. How their Right of Preſentation may be deveſted.

10 Rep. 58. a. in the Chancellor, &c. of Oxford Univerſity's Caſe.

22. When once the Preſentation *hac vice* is veſted in the Univerſity, though the Recuſant conforms himſelf afterwards or dies, yet the Univerſity ſhall preſent.

Per Hutton Sir William Jo. 26. in the Caſe of Standen v. The Univerſity of Oxford and Whitton.

23. So likewiſe if a Recuſant is attaint of Felony or *Præmunire*, the Intereſt of the Univerſity ſhall not be deveſted.

6. How

6. How it may be avoided.

24. The 1 *W. & M.* enacts, That the Benefice to which Perſons are preſented by the Univerſities for the Recuſancy of the Patron, ſhall become void in caſe of Abſence from the ſame above the Space of 60 Days in any one Year. 1 W. & M. Seſſ. 1. 26. ſ. 6.

Void and Voidable.

1. IN the Law ſome Acts are abſolutely void, and others are voidable only; for the better underſtanding whereof, it is neceſſary to conſider,

(A) The Diſtinction between void and voidable.
(B) What Acts are void; wherein of the Degrees, in which Acts may be void, as,

1. What Acts are abſolutely void as to all Purpoſes.
2. What void as to ſome Purpoſes only.
3. What as to ſome Perſons only.
4. How Acts void by Operation of Law may be made good by ſubſequent Matter.

(C) What Acts are voidable only.
(D) How voidable Acts may be made good.
(E) How they may be avoided.
(F) By whom they may be avoided.

(A) The Diſtinction between void and voidable.

1. A Thing is void which was done againſt Law at the very Time of the doing it, and no Perſon is bound by ſuch an Act; but a Thing is only voidable which is done by a Perſon who ought not to have done it, but who nevertheleſs cannot avoid it himſelf after it is done; though it may by ſome Act in Law be made void by his Heir, &c. 2 Lill. Abr. 807.

(B) What

(B) What Acts are absolutely void.

Cart. 19. Keite v. Clopton.

1. ACTS it is said may be void in several Degrees, according to the particular Circumstances of the Case; it will be proper therefore to consider,

1. What Acts are absolutely void as to all Purposes.

Br. Obligation, pl. 26.

2. Bond of a Feme Covert and Infant are void.

This however with regard to the Infant must be understood with some Restriction; for if an Infant gives a Bond without a Penalty, for Necessaries it is good; and the Reason why it is void, if with a Penalty, seems to be that the Law gives Validity to every Act of the Infant's which may be for his Benefit; but it cannot be presumed to be for his Benefit to enter into a Penalty. Noy 85. Delaval v. Clare. Cro. Eliz. 920. Ayliff v. Archdale. S. C. Moor 679. 1 Inst. 172. *a.* 1 Roll. Abr. 729. 1 Lev. 87. Russel v. Lee.

4 Co. Rep. 128. Beverley's Case.

3. So likewise the Bonds of Persons *Non Compos Mentis*, after Office found, are absolutely void.

It is said the Reason why the Bond of an Infant or Person *Non Compos* is void, is because the Law has appointed no Act to be done to avoid it; and the only Reason why the Party cannot plead *Non est Factum*, is that the Cause of Nullity is extrinsic, and does not appear on the Face of the Deed. 2 Salk. 675. Thompson v. Leach. And see *Post*. What Acts are voidable only.

See Ante Tit. Obligation, (D) and (E)

4. And in general all Bonds which are given for a Purpose *Malum in se*, as to kill or rob another, are void.

5. Likewise Bonds given for the Performance of a *Malum Prohibitum*, as for *Maintenance*.—

6. And Bonds to oblige Persons to neglect their Duty to the King and Kingdom, are absolutely void.

2 Salk, 620. Machil v. Clerk. See Post (C)

7. If a future Lease be made to commence after the Death of Tenant in Tail, 'tis merely void in its Creation; for it is not to commence till the Title of the Issue commences, and that is an elder Title concurring with it; and if the Law should make it otherwise than void, the Law would make him a Trespasser.

5 Rep. 30. Prince's Case. 8 Rep. 135. Sir John Needham's Case. Noy 96.

8. If a Bishop grants Administration, and there are *Bona Notabilia*, such Administration is absolutely void, as well as to the Goods within his own Diocese as elsewhere, because he hath in such Case no Jurisdiction whatever.

Crossman v. Hume. And see Post (C).

3 Inst. 231. And it may be added,

9. So likewise a Judgment, given by Persons who have no good Commission for that Purpose, is void.

that in general all Acts done by Ministers of Justice without Authority are void. 10 Rep. 76. *b.* And see *Post* (C).

2 What Acts are void as to some Purposes only.

Finch's Law 62.

10. Void Things are good to some Purposes.—As if

11. Lessee for 20 Years takes a Lease for 10 Years, to begin presently, upon Condition that if a certain Thing be not done the Lease shall be void; in that Case, though the second Lease be void on the Breach of the Condition, yet the Surrender remains good.

Id. ibid.

12. So likewise if a Feoffment be made, to be void on the Non-performance of a certain Condition, yet after the Feoffor's Entry for the Condition broken, the Feoffee shall have an Action for a Trespass done by the Feoffor before.

13. Also

13. Alſo if Tenant at Will grants over his Eſtate, though the Grant be void, yet it determines his Will. Arg. Hard. 47. Jones *v.* Clerk.

But if an Act be made void by a Statute, it ſhall avail to no Purpoſe whatever: Therefore a Simoniacal Preſentation does not ſo much as amount to a Claim. Arg. Hard. 47. Jones *v.* Clerk.

3. What Acts are void as to ſome Perſons only.

14. A *fraudulent Gift* of Goods is not void againſt all, for it remains good againſt the Donor, and is only void againſt his Creditors. Per Anderſon, Cro. Eliz. 445. Upton *v.* Baſſet.

15. So likewiſe a Feoffment upon Maintenance or Champetry is not void againſt the Feoffor, but againſt him that hath Right: *per Beamond* J. Cro. Eliz. 445. Upton *v.* Baſſet.

16. Alſo where a Feme Covert or Infant are bound in an Obligation with others, though the Bond is void as to the Feme Covert or Infant, yet it is good as to the others, who ſhall be ſued alone, and the Writ ſhall not abate. Br. Obligation, pl. 26. 1 Roll Rep. 41. Winſcombe *v.* Pigott. And ſee there whether it is neceſſary to aver the Declaration, that the other is a Feme Covert or Infant.

4. How Acts void by Operation of Law may be made good by ſubſequent Matter.

17. In Equity the Conſent of the Heir makes good a void Deviſe. Chan. Caſes 209. Ld. Cornbury *v.* Middleton.

18. So likewiſe a Deviſe void by Miſnomer of the Corporation was decreed to be a good Appointment of a charitable Uſe, within the 43 *Eliz.* Chan. Caſes 267. Anon.

(C) What Acts are Voidable only.

1. IF a Leaſe be made by the Huſband of the Wife's Land, and the Huſband dies, the Leaſe is not void, but voidable by the Wife's Entry. Arg. 3 Bulſt. 272. cites Plow. Com. 65. Browning *v.* Beeſton.

2. Likewiſe if Tenant in Tail make a future Leaſe for Years, which by Poſſibility may be to commence during the Life of Tenant in Tail, it is not void, but voidable as to the Iſſue. 2 Salk. 620. Machil *v.* Clark. See Ante.

3. So if an Infant makes a Feoffment or a Leaſe, and delivers it with his Hand, it is voidable only. 2 Brownl. 248. Plomer *v.* Hockhead. It is there added, that if the Feoffment or Leaſe be executed by Letter of Attorney, it is a Diſſeiſin to him. It has been ſaid likewiſe, that if the Infant reſerve a ſmall Rent, as one Penny, where the Land is worth 100*l. per Ann.* ſuch Leaſe is void. 2 Leon. 216. *Humfreſton's Caſe.*

4. It is ſaid likewiſe, that a Deed of Exchange entered into by an Infant, or one *Non ſanæ Memoriæ*, is not void, but may be avoided by the Infant when arrived at Age, or by the Heir of him who is *Non ſanæ Memoriæ*. Perk. 281.

5. Alſo

Noy 93. Stone v. Knight. 5. Alſo an Infant's Bond of Submiſſion to an Arbitration ſeems only voidable.

2 Str. 938. Holt v. Ward, Clarencieux. 6. An Infant's Contract of Marriage likewiſe is only voidable.

4 Rep. 124. Beverley's Caſe. 7. So likewiſe the Deed of Perſons *Non compos Mentis*, before Office found, are voidable only, but cannot be avoided by themſelves.

The Reaſon why their Acts cannot be avoided by themſelves, is becauſe it is a Maxim in Law, that no Man of full Age ſhall be admitted to ſtultify himſelf. *Id. ibid.* and ſee *Ante* (B).

PerPopham. Cro. Eliz. 315. Pratt v. Stocke. 8. A Preſentation, Inſtitution, and Induction of a Layman is not void, but only voidable by Sentence.

Cro. Eliz. 457. Bingham v. Smeathwick. 9. Likewiſe if the Archbiſhop of a Province grants Adminiſtration, where there are not *Bona Notabilia* to warrant a Prerogative Adminiſtration, yet ſuch Adminiſtration is only voidable; becauſe the Archbiſhop hath a general Juriſdiction over all the Dioceſes in the Province.

See Ante (B) note the Difference.

Cro. Eliz. 315. Pratt v. Stocke. 10. So alſo if Letters of Adminiſtration be granted to one, and after are granted to another, by this the firſt are not avoided, except by Judicial Sentence.

2 Salk. 674. Hall v. Biggs. 11. An Order of the Juſtices likewiſe, being a Judicial Act, is not abſolutely void, but voidable only, and continues to be an Order till it is avoided.

2 Salk. 674. Prigg v. Adams. S. C. Carth. 274. 12. So likewiſe the Judgment of a ſuperior Court is not void, but only voidable by the Plea or Error.

2 Inſt. 184. 2 R. 3. fo. 21, 22. 13. Thus an erroneous Attainder is not void, but voidable by Writ of Error.

Arg. 1 Rol. Rep. 158, 159. Warren v. Smith, alias Magdalen College's Caſe. 14. Though the Statute of *Weſtm.* 2. 13 *Ed.* 1. *c.* 1. ſays, that *Finis ipſo Jure ſit Nullus*, yet it is not void againſt the Party nor his Iſſue, nor him in Reverſion; but the Iſſue and he in Reverſion have Remedy to avoid it; and the Words of the Statute *ſit Nullus* are conſtrued to mean that it *is as good as void*, in reſpect of the Defeaſableneſs of it.

Arg. Rol. Rep. 159. Smith v. Warren. 15. So where the Statute of Additions ordains, that if any be outlawed without Addition, the Outlawry ſhall be clearly void and of no Effect, yet it ſhall not be void without Writ of Error.

(D) How voidable Acts may be made good.

3 Rep. 64. *b.* Thus in the Caſe above put, where 1. WHERE a Leaſe is voidable, Acceptance of the Rent will make is good: But where it is void, no Acceptance or other Act can make it good.

Tenant in Tail makes a future Leaſe which may poſſibly commence in his own Life, though it is voidable as to the Iſſue, yet it may be made good by the Iſſue's Acceptance of Rent. Arg. 3 Le. 271. Butler v. Waker.

(E) How

(E) How they may be avoided.

1. A Deed being voidable, is to be avoided by Special Pleading, and where an Act of Parliament ſays, that a Deed, &c. ſhall be void, it is intended that it ſhall be by Pleading. 5 Rep. 119. a. Whelpdale's Caſe.

2. Where a Deed is a voidable Deed at the Time of Pleading, as if an Infant ſeal and deliver a Deed, or one of full Age deliver a Deed by Dureſs, &c. the Obligor muſt not plead *Non eſt factum:* Becauſe when the Action was brought it was his Deed, and muſt be avoided by Special Pleading. 5 Rep. 119 a. Whelpdale's Caſe. But if the Seal be broke, Defendant may plead *Non eſt factum*, for though it was once a Deed, yet at the Time of the Plea, it was not his Deed. Id. Ibid.

3. But a Feoffment or Leaſe for Life, which is declared to be void on Breach of a Condition, muſt nevertheleſs be made void by Re-entry, it being a Freehold conveyed by Livery: Whereas a Leaſe for Years on Breach of the Condition is abſolutely void, and there needs no Re-entry. 3 Rep. 65. a. Pennant's Caſe. Poph. 100. Goodale v. Wyatt.

(F) By whom they may be avoided.

1. OF a void Act or Deed every Stranger may take Advantage, but not of a voidable one; as if there are two Jointenants within Age, and one makes a Leaſe for Years, and dies, the other ſhall avoid it, for the Leaſe is utterly void; but if the one leaſes for Life and makes Livery in Perſon, and dies, the other ſhall not avoid it. *Per Wray* Ch. J. 2 Le. 218. in Humpherſton's Caſe.

USES and TRUSTS.

Gil. Law of Uſes 175. 1 Rep. 121. Chudleigh's Caſe.

1. AN Uſe at Common Law was an equitable Right which he reſerved, who conveyed a legal Eſtate to another, upon Truſt and Confidence that the Perſon to whom he ſo conveyed it, would nevertheleſs ſuffer him to take the Rents and Profits of the Land, and that he would execute Eſtates according to his Direction.

2. The *Feoffee* therefore, or *Terretenant*, (that is, the Perſon to whom the legal Eſtate was conveyed) had the Freehold or ſole Property in him; and the Perſon who had conveyed the legal Eſtate to him (that is, the *Ceſtui que Uſe)* had neither *Jus in Re*, nor *ad Rem*, for if he had entered upon the Land without the Conſent of the Feoffee, he had been a Treſpaſſer; ſo that nothing remained in him but a bare Confidence or Truſt, for which, if it was broken, he had no Remedy, but by Subpœna in Chancery.

3. But this equitable Right extended itſelf to all Perſons who claimed in Privity under the Feoffee, that is, who came into the ſame Eſtate which the Feoffee had to the Uſe, and by Contract with *him:* For a *Diſſeiſor* came into the ſame Eſtate, but not by Contract or Agreement, and therefore claiming not *by* or *from* the *Feoffee*, he conſequently did not claim the Eſtate as it was ſubject to the Uſes, but he claimed an Eſtate above that free from and diſcharged of the Uſes; and it would in a Manner have defeated his Title, ſhould he have been compelled to ſtand ſeized to an Uſe, when he did not claim the Eſtate which was charged with the Uſe: For Confidence in the Perſon, was requiſite as well as Privity of Eſtate.

4. Confidence in the Perſon, was either expreſs or implied; as if a Feoffee to an Uſe had, for *good Conſideration*, enfeoffed one who had *no Notice* of the Uſe, the Uſe was deſtroyed; for the Perſon enfeoffed not knowing that there were any Uſes, no Truſt could be repoſed in him to let the *Ceſtui que Uſe* take the Profits; but if he had Notice, a Truſt might well be ſaid to be repoſed in him, ſince he took the Land, knowingly, charged with the Uſes. So alſo, if the Feoffment had been made *without Conſideration*, though the Perſon infeoffed had *no Notice* of the Uſe, yet he would nevertheleſs have ſtood ſeized to the Uſe, for the Law in that Caſe would have implied Notice of the Uſe, and conſequently the Truſt would have remained.

5. From hence it may be collected, that to every Uſe at Common Law there were two inſeparable Incidents; a Privity in Eſtate, and a Confidence in the Perſon; and where either of theſe failed, the Uſe was ſuſpended or deſtroyed.

6. But for the better underſtanding of the Law relative to this Head, we ſhall conſider,

(A) Of the Origin and firſt Introduction of Uſes.

(B) Of the ſeveral Properties of an Eſtate in Uſe at Common Law, which are,

1. That

1. That it is alienable; wherein of the Power of *Ceſtui que Uſe*,
   1. At Common Law.
   2. By the Statute of 1 *R.* 3. *c.* 1.
2. That it is deſcendible; wherein,
   1. Of the Deſcent of an Uſe in Poſſeſſion.
   2. Of the Deſcent of an Uſe in Reverſion.
3. That it is deviſable.
4. That it is not extendible or Aſſets.
5. That it is not forfeitable.
6. That a Woman is not dowable of an Uſe.

(C) **Of the Inconveniences of Uſes.**

(D) **Of the Alterations introduced with reſpect to Conveyances to Uſes by the** 27 *H.* 8. *c.* 10.

(E) **Of the ſeveral Sorts of Conveyances to Uſes; wherein,**

1. Of thoſe which raiſe Uſes by way of Tranſmutation of Poſſeſſion, ſuch as, 1. Feoffment. 2. Fines. 3. Recoveries. *Of which before under their reſpective Titles*: *But herein farther*,

   Of Deeds declaring the Uſes of Feoffments, Fines, and Recoveries; wherein,

   1. Who may declare Uſes.
   2. To whom they may be declared.
   3. In what Manner they may be declared.
   4. At what Time they may be declared.
   5. In what Caſes Averments may be made of Uſes.

2. Of thoſe Conveyances which raiſe Uſes without Tranſmutation of Poſſeſſion, ſuch as,
   1. Covenants to ſtand ſeiſed to Uſes; wherein,
      1. Who may covenant to ſtand ſeiſed, and to whom.
      2. What Conſideration is neceſſary to a Covenant to ſtand ſeiſed, and how far it extends.
      3. By what Words a Man may covenant to ſtand ſeiſed.
      4. The Effect of a Covenant to ſtand ſeiſed.
   2. Of Bargain and Sale; *of which before under its proper Title.*

(F) **What Kind of Property may be conveyed by way of Uſe.**

(G) Of the ſeveral Kinds of Uſes executed by the Statute, ſuch as

1. Uſes in *Eſſe.*
2. Uſes in Poſſibility; wherein,
    1. Of Executory Fees; and the Difference where they riſe by way of Uſe, and where by Deviſe.
    2. Of contingent Remainders, *of which before under Title Remainder:* But herein farther,
        1. In what Manner they are to be executed.
        2. How they may be defeated.
            1. Where there is no Power of Revocation.
            2. Where there is an expreſs Power of Revocation.
        3. How they may be ſuſpended, revived or extinguiſhed.

(H) Of the Caſes out of the Statute; as

1. Where Uſes are limited upon Uſes.
2. Where Terms are raiſed and limited in Truſt; wherein
    1. Of Terms which wait on the Inheritance.
    2. Of Terms in Groſs.
3. Where Lands are limited to Truſtees to pay over the Rents and Profits.

(I) Of reſulting Uſes, or Uſes by Implication.
(K) Of ſecond or ſhifting Uſes.
(L) Of the Manner of pleading Uſes.

(A) Of the Origin and firſt Introduction of Uſes.

Gil. Law of Uſes 3.

1. THE Original of Uſes was from a Title under the Civil Law, which allows of an uſufructary Poſſeſſion, diſtinct from the Subſtance of the Thing itſelf; and it was brought over to us from thence by the Clergy, who were Maſters of the Civil Law; for when they were prohibited from taking any Thing in Mortmain, and after ſeveral Evaſions by purchaſing Lands of their own, Tenants ſuffering Recoveries, and purchaſing Lands round the Church and making them Church-Yards, by Bull from the Pope, at laſt this Way was invented of conveying Lands to others to their own Uſe; and this being proper Matter of Equity, it met

met with a very favourable Conſtruction from the Judge of the Chancery Court, who was in thoſe Days commonly a Clergyman; and the Clergy thought this a Statute contrary to natural Juſtice, and ſo could eaſily tolerate any Act for evading it. Thus this Way of Settlement began; and was often uſed for other fraudulent Purpoſes, as to defeat juſt Debts, Wardſhips, Eſcheats, &c. but it more generally prevailed among all Ranks and Conditions of Men, by reaſon of the Civil Commotions between the Houſes of *Lancaſter* and *York*, to ſecrete the Poſſeſſions, and to preſerve them to their Iſſue notwithſtanding Attainders. Sir William Jones 127. Lord Willoughby's Caſe.

(B) Of the ſeveral Properties of an Eſtate in Uſe at Common Law.

1. UNder this Head, it will be ſufficient to obſerve in General. 1. That at Common Law an Uſe is alienable. 2. That it is deſcendible. 3. That it is deviſeable. 4. That it is not extendible or Aſſets. 5. That it is not forfeitable. 6. That a Woman is not dowable of an Uſe.

1. That it is alienable; wherein of the Power of *Ceſtui que Uſe*.

1. At Common Law. 2. By the Statute of 1 *R.* 3. *c.* 1.

1. At Common Law.

2. It has been ſaid in the Definition of an Uſe, that *Ceſtui que Uſe* had neither *Jus in Re*, nor *ad Rem*; for if the Feoffee broke his Truſt he had no Remedy againſt him but by Subpœna in Chancery.

3. This Subpœna commenced in the Time of *E.* 3. but it was always againſt the Feoffee in Truſt himſelf, and was never allowed againſt his Heir till *H.* 6. and in this Point was the Law changed by *Forteſcue* Ch. J. Kelw. 42. b.

4. So that if the Feoffee had died, his Heir was ſeized to his own Uſe. Alſo the Feoffee's Feoffee was ſeiſed to his own Uſe, as the Law was taken to the Time of *Hen.* 4. till at length the Subpœna was granted both againſt the Heir, and the Feoffee of the Feoffee, about the Time above mentioned, or according to ſome later. Id. Ibid. and 46. b.

5. But though at Common Law *Ceſtui que Uſe* had no Power over the Land, yet might alien the Uſe, becauſe every one might diſpoſe of the Rights that were in him; or he might prefer a Bill in Chancery to make the Terre-tenant execute the Uſe in himſelf. Gil. Law of Uſes 26.

6. But at Common Law, if *Ceſtui que Uſe* had entered and made a Feoffment in Fee of the Lands, this had not been good to paſs the Eſtate to the Feoffee; becauſe *Ceſtui que Uſe* had not the Freehold in him, and ſo could not paſs it to another; but by his Entry he was a Diſſeiſor: Yet in this Caſe, if the Feoffees of *Ceſtui que Uſe* had re-entered upon the Purchaſer, the Feoffees would not have had the Lands to their own Uſe; and they would not have ſtood ſeized to the Uſe of *Ceſtui que Uſe*, becauſe he had transferred the Uſe to another. Plow. 352. b. The Feoffees upon their Reentry would, it ſeems, ſtand ſeiſed to the Uſe of the laſt Feoffee. See Plow. *loc. cit.*

Bro. F. to Uſes 338. ſ. 23, 339. ſ. 26.

7. If *Ceſtui que Uſe* makes a Leaſe for Years, rendering Rent, the Reſervation is void, unleſs it is by Deed, for the rendering Rent to a Man is an Acknowledgement of the holding Lands from him; but here the Lands are not held of *Ceſtui que Uſe*, but of the Feoffees who have the Reverſion. But if the Reverſion be by Deed, the Feoffees ſhall not have the Rent reſerved but *Ceſtui que Uſe* ſhall have it.

Bro. F. to Uſes 339. ſ. 28.

8. If *Ceſtui que Uſe* make Feoffment, with a Letter of Attorney to give *Livery*, and the Attorney gives Livery accordingly; Q. Whether the Feoffment was good; or Whether it was not a Diſſeiſin.

9. But by the Statute of 1 *R.* 3. *c.* 1. a Power was annexed to an Uſe, that *Ceſtui que Uſe* ſhould alien the Lands.

Gil. Law of Uſes 27.

10. The Reaſon of that Statute was, becauſe *Ceſtui que Uſe* in Poſſeſſion often aliened the Lands, and then the Feoffees entered, which cauſed a great deal of Vexation and Chancery Suits; and therefore the Statute gave *Ceſtui que Uſe* an immediate Power of Alienation, without the Concurrence of the Feoffees; which leads us more particularly to examine the Power of *Ceſtui que Uſe*.

2. By the Statute of 1 *R.* 3. *c.* 1.

11. The Statute of 1 *R.* 3. *cap.* 1. enacts that *every Eſtate, Feoffment, Gift, Releaſe, Grant, Leaſes, and Confirmation of Lands, Tenements, Rents, Services, or Hereditaments made or had, or hereafter to be made or had by any Perſon or Perſons, being of full Age, of whole Mind, at large, and not in Dureſs, to any Perſon or Perſons; And* * *all* † *Recoveries and Executions had or made, ſhall be good and effectual to him to whom it is ſo made, had, or given, and to all other to his Uſe, againſt the Seller, Feoffor, Donor, or Grantor thereof, and againſt the Sellers, Feoffors, Donors, or Grantors, his or their Heirs, claiming the ſame only as Heir or Heirs to the ſame Sellers, Feoffors, Donors, or* ‡ *Grantors and every of them, and againſt all others having or claiming any Title or Intereſt in the ſame,* ‖ *only to the Uſe of the ſame Seller, Feoffor, Donor or Grantor, Sellers, Feoffors, Donors or Grantors, or his or their ſaid Heirs, at the Time of the Bargain, Sale, Covenant, Gift, or Grant made:* § *Saving to every Perſon or Perſons ſuch Right, Title, Action, or Intereſt, by Reaſon of any Gift in Tail thereof made, as they ought to have had, if this Act had not been made.*

* By this Word (all) Feint Recoveries, as well as Recoveries upon good Title, are comprehended. But they are good only againſt the Grantors, &c. and their Heirs claiming only as Heirs to ſuch Grantors, &c. So that they are not good againſt him that claims as Heir to the Grantor and his Feme in Tail *per formam Doni* Arg. Pl. C. 4. a. b. Mich. 6 Eliz. in Manxell's Caſe. † If a Man recovers by erroneous Judgment, and makes Feoffment to his Uſe, and the other brings Writ of Error, and reverſes the Judgment, he may enter without *Scire facias* againſt the Feoffees; for it is a Recovery, and therefore it ſhall bind him and his Heirs and Feoffees by the Statute 1 R. 3. Bro. Feoffment to Uſes 337. ſ. 3. ‡ Yet if *Ceſtui que Uſe* grants a Rent-charge, and the Feoffees are diſſeiſed, the Grant ſhall be good againſt the Diſſeiſor; and yet he does not claim only by the *Ceſtui que Uſe* Arg. 2. Le. 153. pl. 185. in Caſe of Cordel's Executors *v.* Clifton. ‖ This Statute did not take away the Power of Feoffees; for they may yet make Feoffments; but enlarge the Power of *Ceſtui que Uſe*, who may now make Feoffments likewiſe. Godb 303. in Caſe of Lord Sheffield *v.* Ratcliff. § It was agreed *per Cur.* that theſe Words are taken for Tenant in Tail in Poſſeſſion, and not Tenant in Tail in Uſe; for *Ceſtui que Uſe* in Tail has no Right or Intereſt. Br. Feoffment al Uſe, 339. b. ſ. 40.

Godb. 318. Lord Sheffield's Caſe. 2 R il. Rep. 334. S. C.

12. Here it is obſervable, that there is a Difference between a Feoffment according to this Statute and a Feoffment at Common Law; in caſe of Feoffments at the Common Law, the Feoffor ought to be ſeiſed of the Lands at the Time of the Feoffment; but if a Feoffment be according to the Statute of 1 *R.* 3. in ſuch Caſe the Feoffor did not need to be in Poſſeſſion: Feoffments at the Common Law give away both Eſtates and Rights; but Feoffments by the Statute of *R.* 3. give the Eſtates but not the Rights. In Caſe of Feoffments at Common Law, the Feoffee is in *Per viz.* by the Feoffor; but in Caſe of Feoffments by the Statute of *R.* 3. the Feoffees are in the *Poſt, viz.* by the firſt Feoffees.

Another

13. Another Difference likewiſe is taken in *Plowden* between the Feoffment of the Feoffees and of *Ceſtui que Uſe*; for if the *Ceſtui que Uſe* for Life or in Tail makes a Feoffment in Fee, either with or without Conſideration, all the old Uſes were diſcontinued, and the antient Eſtate which the Feoffees had, is gone, and a new Eſtate created ſubject to theſe new Uſes raiſed by the Feoffment; for when *Ceſtui que Uſe* makes a Feoffment in Fee, which by the Statute he might lawfully do, he paſſed an Uſe in Fee Simple to the Feoffee; which being a new Uſe to the Feoffee, all the old Uſes were diſcontinued, and conſequently the Eſtate of the Feoffee muſt be altered; for were it the antient Eſtate, it were ſtill ſubject, by the former and elder Limitation of Uſes, to the old Uſes; therefore have the Feoffees, by Conſtruction, a new Eſtate to the new Uſes; but if the Feoffees themſelves had made a Feoffment without Conſideration, the Feoffees had ſtood ſeized to the old Uſes, for here was no Uſe nor new Eſtate. Gil. Law of Uſes 180. cites Pl. C. 350.

14. By the Statute *Ceſtui que Uſe* has no Power of Alienation, when he has a naked Right to an *Uſe*, and not an Uſe in *Eſſe*; unleſs it be in order to confirm an Eſtate in Being; becauſe the Intent of the Statute was only to give *Ceſtui que Uſe* a greater Power to transfer his Eſtate, and not any other Remedy to regain and reveſt it; and unleſs he has the *Uſe*, he cannot paſs the *Uſe*, much leſs the Poſſeſſion to another. Gil. Law of Uſes 27. Plow. 351.

15. But if the Feoffee to an Uſe in Fee be diſſeiſed, and *Ceſtui que Uſe* releaſes to the Diſſeizor, this extinguiſhes the Uſe, and by the Statute bars the Entry of the Feoffee. Plow. 351. For by the Words of the Act, the Releaſe is good againſt all claiming any Title or Intereſt to the Uſe of Releaſor. Id. Ibid.

16. Alſo where Feoffees to an Uſe are Diſſeizees, and after the Diſſeizor enfeoff *Ceſtui que Uſe*, who enfeoffs a Stranger; this is good, and ſhall bind the Feoffees, for the Feoffment is good to paſs the Poſſeſſion, and Right of the Uſe, which he had in him; and the Feoffees cannot enter to revive an Uſe, which the Party himſelf by his own Act has extinguiſhed. Gil. Law of Uſes 28.

17. The Statute likewiſe is to be underſtood of *Ceſtui que Uſe*, that has an *Uſe* in *Eſſe*, in Oppoſition to him that has only a Reverſion or Remainder of an Uſe.

18. If a Feoffment be made to the Uſe of *A.* for Life, Remainder to *B* in Fee, *A.* may alien in Fee, becauſe the Feoffees claim the whole Eſtate for the Uſe of *A.* during his Life, and he has the whole Advantage of it; and the Statute that gives the preſent Poſſeſſor of the Uſe a Power of Alienation, has provided an immediate Remedy for the Remainder Man. Gil Law of Uſes 28. Plow. 350.

19. But if the Tenant for Life of an Uſe aliens in Fee, and dies, the Feoffees may enter on the Alienee; for by the Words of the Statute, the Alienation is good againſt *Ceſtui que Uſe* and his Heirs, and Perſons claiming only to his Uſe: So when Feoffees claim to the Uſe of the Remainder Man, the Feoffment of Tenant for Life, according to the Authority given by the Statute, is no longer valid to bar the Feoffees of the Entry; for their Right is by the Common Law. Gil. Law of Uſes 29. Plow. 348. Delamer and Barrard's Caſe, the Point reſolved.

20. If there be a Feoffment in Fee to the Uſe of *A.* for Life, the Remainder to *B.* in Fee, *B.* has no Power of Alienation by the Statute, during the Continuance of the Eſtate for Life, becauſe the Poſſeſſion is, as is ſaid, to the Uſe of *A.* only, during his Life, and ſo the Remainder Man has nothing to do with the Poſſeſſion, and if the Remainder Man ſhould enter on the Feoffees and make a Feoffment, either the Uſe of Tenant for Life would be deſtroyed, or the Feoffees muſt re-enter and create a particular Eſtate to themſelves, without being ſubject to Dower, for by the Gil. Law of Uſes 29. Plow. 350. 1 Co. 128. b. But though *B.* cannot make a Feoffment during the Continuance of the Eſtate for Life, yet, it ſeems he may ſell his Remainder during the Life of *A.* Br. Feoff. to Uſes 339. b. 44.

Common

Common Law, every particular Eſtate is derived out of the Fee-Simple by the Agreement of the Parties in Intereſt; but here are no Parties to ſuch Agreement, and the Statute has not altered the Law in this Caſe.

Gil. Law of Uſes 30. Plow. 350. b.

21. But if there be a Feoffment for Life, Remainder in Fee, he in Remainder may make a Leaſe for Years, or grant a Rent-charge to begin after the Death of Tenant for Life; for he cannot enter and take the Poſſeſſion out of the Feoffee; but it is an executory Contract on which the Statute operates after the Death of Tenant for Life.

Plow. 350. The Reaſon is, that here the Eſtates are ſeveral, and the Uſes go out of the ſeveral Eſtates,

22. So likewiſe if a Leaſe for Life is made to the Uſe of *A.* and afterwards the Reverſion is granted to another for Life to the Uſe of *B.* and Attornment is had, and afterwards the Reverſion is granted to another in Fee to the Uſe of *C.* in Fee, and Attornment is had; in this Caſe *A.* may give the firſt Eſtate for Life to whomſoever he pleaſes, and *B.* may grant the Reverſion for Life to whomſoever he pleaſes, and *C.* may grant the Reverſion in Fee to whomſoever he pleaſes.

whereas in the Caſe of a Feoffment to the Uſe of one for Life, *&c.* all the ſeveral Uſes iſſue out of one Eſtate, *viz.* out of the Fee Simple, which is one ſame Eſtate without Diviſion, and the ſeveral Poſſeſſors of the ſeveral Uſes cannot ſever the Eſtate which is intire. Plow. *loc. cit.*

Plow. 350.

23. Where a Feme Covert was *Ceſtui que Uſe*, and ſhe and her Baron made Feoffment. This was good but during the Life of the Baron only, by Equity and Reaſon, though the Statute of 1 *R.* 3. ſays nothing of a Feme Covert.

Gil. Law of Uſes 32. 1 Inſt. 202. a. But if Huſband ſeized in Right of his Wife make ſuch

24. It is to be obſerved farther with Regard to the Power given over Eſtates in Uſe, that if *Ceſtui que Uſe* makes a Feoffment in Fee upon Condition, and after enters for the Condition broken, he ſhall be ſeized of the Eſtate in the Land; for the whole Eſtate is diveſted out of the Feoffee by the Feoffment, and they cannot enter for the Condition broken, becauſe no Parties to it.

Feoffment, and re-enter for the Condition broken, there he ſhall be ſeized in Right of his Wife, as before. Bro. Feoff. to Uſes, 338. b. ſ. 23.

Bro. F. al. Uſes 337. ſ. 2. 338. ſ. 22.

25. But if *Ceſtui que Uſe* in Tail aliens the Land by Leaſe and Releaſe, or Feoffment; this only binds the Feoffees during his Life, becauſe he has no longer Power of Alienation; if the *Ceſtui que Uſe* however aliens by Fine, this is good, and bars the Entry of the Feoffees after his Death; for that would diſpoſſeſs the Eſtate in Tail by the Statute of 4 *H.* 7. yet if he aliens by Recovery, it does not bind the *Iſſue*, becauſe he is not *Tenant to the Præcipe*; ſo that would be no Bar at Common Law, and this is not helped by any Statute: For though a Recovery here be expreſsly mentioned, and ſo binds the Party himſelf, yet the Right of the Eſtate in Tail is ſaved.

Ibid. ſ. 7. Gil. Law of Uſes 32.

1 Ch. Caſ. 49. 213. 2 Ch. Caſ. 63, 64.

26. If Tenant in Tail of a Truſt levy a Fine, or ſuffer a Recovery, this is an equitable Bar of the Eſtate, though the Truſtee does not join in the Recovery to make a legal Tenant to the *Præcipe*; for as the Fine and Recovery paſs the Entail in a legal Eſtate at Common Law, ſo it paſſes the Entail of a Truſt in the Court of Equity.

1 Ch. Caſ. 119, 120.

27. But if Tenant in Tail of a Truſt makes a Mortgage, or acknowledges a Judgment or Statute, and then levies a Fine and ſettles a Jointure, the Jointreſs ſhall hold it ſubject to the Mortgage or Judgment, in the ſame Manner as if the Mortgagor or Conuſor had been Tenant in Tail of the legal Eſtate, and after the Mortgage or Judgment had levied a Fine and made a Jointure; becauſe the ſubſequent Declaration of the Uſe of the Fine is merely the Act of Tenant in Tail, and he cannot by any Act of his own make a ſubſequent Conveyance take Place of one precedent; and the rather becauſe the Feme claims under that Fee which Tenant in Tail got by the Recovery or Fine; and that Fee was ſubject to all the Charges he had laid upon it.

28. If

28. If *Ceſtui que Uſe* makes a Leaſe for Years, reſerving a Rent, he ſhall have an Action of Debt upon the Contract, but he ſhall not *avow*, becauſe the legal Eſtate of the Reverſion is ſtill in the Feoffees, ſince he has put the Eſtate out of them but for a Term; but the equitable Eſtate is in him, and he may diſpoſe of it, and the Rent paſſes; but the Feoffees ſhall puniſh for *Waſte* done by the Tenant, and enter for a Forfeiture, *&c.* Bro. Feoff. to Uſes 337. ſ. 6. 338. ſ. 18.

29. Alſo if *Ceſtui que Uſe* makes a Leaſe for Years, reſerving a Rent, this ſhall go to his Heirs; for ſince the Statute has given him Power to make Eſtates at Law, they are governed by the Rules of Common Law. Bro. F. al Uſes 338. b. ſ. 18. 23. & 39. Gil. Law of Uſes 34.

30. So likewiſe if *Ceſtui que Uſe* makes a Leaſe for Years, reſerving a Rent with a Clauſe of Re-entry for Non-payment of the Rent, and the Rent is behind, *Ceſtui que Uſe* may enter; for he only can take Advantage of his own Condition. And ſince the Statute allows the Act of Re-entry by allowing him Power to make Leaſes, he ſhall for ever keep the Poſſeſſion againſt the Feoffees. *Quære tamen.* Br. F. to Uſes 338. ſ. 18. Gil. Law of Uſes 34.

31. A Gift of Land for Years, or of a Leaſe for Years, to an Uſe, is good, notwithſtanding the Statute of *R.* 3. For the Statute is intended to avoid Gifts of Chattels to Uſes, to defraud Creditors only; and ſo is the Preamble and Intent of this Statute. Bro. Feoff. to Uſes 340. ſ. 60.

32. But the Statute does not give *Ceſtui que Uſe*, any Power to deviſe the Land. The next Property is, Gil. Law of Uſes 32.

2. That it is deſcendible; wherein

33. With Reſpect to the Deſcent of Uſes, we muſt conſider, 1. Of the Deſcent of an Uſe in Poſſeſſion. 2. Of the Deſcent of an Uſe in Reverſion.

34. Concerning the firſt, it is a Principle, That if an Uſe be limited to a Man and his Heirs, the Court of Chancery will direct it to go to ſuch Perſons as the Common Law has appointed to repreſent him, for the Chancery cannot alter the common Import of Words, or ſet up Rules of Property oppoſite to the Rules of Law. Gil. Law of Uſes 16.

35. As the Court of Chancery cannot alter the Deſcent of the Land, ſo it cannot alter the Law and Cuſtom of a Place; for all immemorial Uſages are Part of the Laws of the Land: And ſo if a Man makes a Feoffment in Fee of Lands in Gavelkind, or Burrough Engliſh, without a Conſideration, to the Uſe of the Feoffor and his Heirs, this ſhall go to all the Sons, or to the youngeſt, according to the Cuſtom. 1 Rep. 101. Shelley's Caſe. Dy. 179. 2 Ro. Ab. 780. 1 Inſt. 23. 13 Rep. 56.

Samme's Caſe. See Hob. 31. Counden *v.* Clerke. Br. Feoff. to Uſes 339. ſ. 32.

36. So alſo if there is a Cuſtom, that Lands ſhall go to the eldeſt Daughter only, where there is no Son, and a Truſt in Equity deſcends upon the Heir, it ſhall go to the eldeſt Daughter only. 2 Ro. Ab. 780. 1 Car. Jones *v.* Reaſby.

It was in the ſame Term decreed in Chancery accordingly. Ibid.

37. As the Chancery is governed by Rules of Inheritance, therefore none can make himſelf Heir, but he that repreſents the Perſon that was laſt in Poſſeſſion; for he that laſt poſſeſſed it had the entire Dominion and Property, which none elſe can have but by ſtanding in his Place; and no Man can ſtand in his Place but one of the whole Blood. 1 Inſt. 14. 4 Rep. 22. Copyhold Caſes.

38. Thus if Lands deſcend on the Part of the Mother, and the Party makes a Feoffment in Fee, without Conſideration, or reſerving this Uſe 1 Inſt. 13. a. 2 Ro. Ab. 780.

13 Rep. 56. Samme's Caſe. Bro. F. to Uſes 338. a. ſ. 10. But ſee Hob. 31. Conden *v.* Clarke, and Dy. 134.

to him and his Heirs, the Uſe ſhall deſcend to the Heirs of the Part of the Mother; for the Land would have gone to the Heirs of the Part of the Mother, and an Uſe is but an Eſtate in Equity, Part of the Eſtate in the Land; for the Rule of Law that tends to the Eſtabliſhment of Families and Incouragement of Induſtry, is, that thoſe that take Benefit as Repreſentatives ſhall convey it all along in the Blood of the firſt Purchaſer, from whom the Benefit was derived, and the Uſe and Poſſeſſion was derived from the Mother, and the Uſe was never parted with, but the Poſſeſſion only; ſo the Uſe muſt be all along conveyed to the Heirs on that Side.

Gil. Law of Uſes 18. 1 Rep. 121. Chudleigh's Caſe.

39. It is to be obſerved likewiſe, that there is a *Poſſeſſio Fratris* of an Uſe, which follows the Analogy of Deſcents at Law; and ſo if a Man ſeized in Fee of an Uſe had Iſſue a Son and a Daughter by one Venter, and a Son by another Venter, and deviſes it for Years, and dies, and the Son dies during the Term, the Daughter ſhall have it, and not the Son; otherwiſe it had been if he had deviſed it for Life.

Bro F. to Uſes 337. b. 4. 1 Rep. 100. b. Shelley's Caſe. Gil. Law of Uſes 17, 18.

40. Alſo if a Man for a valuable Conſideration purchaſes Lands, or the Uſe of them to himſelf, yet they ſhall deſcend to his Heirs; for there wants not the Word Heirs to create an Inheritance in an Uſe; for it is Equity that a Perſon, who gave a Conſideration for the Fee, ſhould have it; and that is not ſetting up any other Rules of Property oppoſite to the Rules of Law, but mitigating and diſpenſing with the Rules of Law, in particular Caſes, where they ſhould happen to ſhelter Diſhoneſty and Oppreſſion: But now, ſince the Statute, no Inheritance can be raiſed without the Word Heirs, becauſe now the Uſes, as will be ſhewn, are transferred into Poſſeſſion, and muſt be governed by the Rules of Poſſeſſion at Common Law, as to the Words that create new Eſtates.

2. Of the Deſcent of an Uſe in Reverſion.

41. In Regard to Deſcents of this Kind, they are governed by the following Rules.

42. Where a Man has an Eſtate in himſelf, and limits an Eſtate to his Right Heirs, he is ſeized of the whole Eſtate.

1 Vent. 380. Pibus v. Mitford. Gil. Law of Uſes 19.

43. In the ſame Manner, where a Man has an Uſe in himſelf, and limits an Uſe to his own Right Heirs, the ſame Uſe is in him ſtill. The Reaſon is, becauſe Anceſtor and Heir are correlative; and ſo whoever repreſents me as to my Eſtate veſted in him after my Death, I repreſent him during my Life as to that Eſtate; and conſequently giving an Eſtate, already in me, to my Heir, is not departing with it, for 'tis a Diſpoſition in other Words to myſelf, and ſo all Things remain *in Statu quo*.

1 Inſt. 22. b. Gil. Law of Uſes 20.

44. Thus if a Man ſeized of Lands in Fee, makes a Gift in Tail, or a Leaſe for Life, Remainder to his own Right Heirs, they take by Deſcent, as in the old Reverſion.

Gil. Law of Uſes 20.

45. Alſo if *A.* ſeized of Lands in Fee, grants them by Fine, during his own Life, the Remainder to his own Right Heirs, the Reverſion is in him, and he may grant it.

Id. Ibid. Dy. 237.

46. So likewiſe in the Caſe of a Fine *ſur Conuzance de Droit què il et ſa Feme ad de ſon done* to the Huſband, with Remainder to the Conuſor, for Life, Remainder to the Right Heirs of the Huſband, they are in the old Reverſion, and the Wife ſurviving ſhall have it for Life.

E. of Bedford's Caſe. Pop. 3. 1 Moor 718, 719. S. C. 1 Rep. 130. Chudleigh's Caſe.

47. Alſo if a Man makes a Feoffment without a valuable Conſideration, to the Uſe of himſelf, for forty Years, the Remainder to *B.* in Tail, the Remainder to his own Right Heirs; the Feoffor is in the old Reverſion, and he may deviſe it, for a Feoffment without Conſideration does not diſpoſe of the Uſe thereof; the old Uſe is in him ſtill.

48. But

48. But it hath been held, that if the Feoffment were made upon a valuable Conſideration, inaſmuch as that it is a Diſpoſition of the Uſe, there is an Eſtate in the Feoffees to retain it till the Death of the Feoffors; and this is an Eſtate of Freehold, and affords a Tenant to the *Præcipe*, and an Eſtate to ſupport a contingent Remainder. 1 Inſt. 22. b. 23. a. Gil. Law of Uſes 21.

49. Alſo where I limit an Uſe, already in me, to my own Repreſentatives, and add a Qualification to thoſe Repreſentatives; though this be no departing with the Eſtate, becauſe there are not Words to convey it out of myſelf, yet there is an Alteration of the Eſtate in myſelf, and the Uſe ſhall alter and deſcend to my Heirs that came under that particular Diſtinction and Qualification; becauſe the Uſe has always been changed and modified according to the Intent of the Parties who have the Intereſt; and ſuch a particular Eſtate ſhall be ſuppoſed in them, as may beſt anſwer the Intent, *ut res valeat*. Gil. Law of Uſes 20.

50. It is to be obſerved likewiſe with reſpect to *Remainders*, that where a Man limits an Eſtate of Freehold to me for Life, with a Remainder to my Heirs, though after ever ſo many particular Eſtates, the Remainder is veſted in me for three Reaſons. 1 Vent. 372, to 382. Gil. Law of Uſes 21.

51. Firſt, Becauſe otherwiſe you conſtrue the Grant moſt in Favour of the Grantor, and let him into the Reverſion during the Contingency, to puniſh Waſte and enter for the Forfeiture.

52. Secondly, Becauſe the whole Advantage muſt be intended to me when I am firſt named to take the ſame Sort of Eſtate in the Conveyance, and the Benefit is not deſigned to any other particular Conveyance, but to all other Perſons that bear the Character of my Repreſentatives; ſo that the Limitation is for my Sake, and only intends to enlarge my Eſtate after the particular Eſtates are worn off, yet cannot be conſtrued in the ſame Manner as where an Eſtate is limited to *A.* the Remainder to the Right Heirs of *B.* becauſe there is nothing in the laſt Caſe to lead the Mind to ſuch an Interpretation; for there is no Benefit originally deſigned to *B.* but to his Heirs primarily and ſo the Heir takes as a Purchaſer.

53. But if the ſame Sort of Eſtate be not limited to the Anceſtor as to the Heir, the Heir muſt take by Purchaſe; for it is plain the Donor deſigned him an original Benefit, quite different from what he deſigned the Anceſtor.

54. Thirdly, Becauſe when the particular Eſtates are worn off, they are as if they had never been; and ſo the Heir ſhould claim by Deſcent, as in his better Title, and as of the dying ſeized of his Anceſtors.

55. Another Reaſon of this Law is, becauſe it muſt be a contingent Remainder, or a Remainder veſted; but it would not be a contingent Remainder, becauſe of Neceſſity it muſt be in the Anceſtor, and the Perſon that repreſents him, and ſo conſtrued a Remainder veſted.—Thus

56. If *J. S.* makes a Feoffment to the Uſe of *A. L.* the Remainder to *B. F.* the Remainder to the Right Heirs of *A.* the Remainder is veſted in *A.* and his Heirs claim by Deſcent. Gil. Law of Uſes 23. Cro. Car. 24. a.

57. But if *J. S.* makes a Feoffment to the Uſe of *A.* for a Term of Years, the Remainder to *B. T.* the Remainder to the right Heirs of *A.* the Remainder is not veſted in *A.* but his right Heirs take by Purchaſe. Moor 710. Earl of Bedford's Caſe. Gil. Law of Uſes 23.

58. If an Eſtate be limited to *A.* for Life, Remainder to the Heirs Males of the Body of *A.* and to the Heirs Males of ſuch Heir Male, there is a Truſt executed in *A.* becauſe this is within the Rule; for here an Eſtate is limited to *A.* for Life, with a Remainder to his Heirs; and ſo the Word Heirs is not a Name or Purchaſe, but of Limitation. 1 Inſt. 22. b. 2 Rep. 91. b. cites Fenwick v. Mitford.

59. But if an Eſtate be deviſed, or *per Hale*, be conveyed to *A.* for Life, the Remainder to his next Heir Male, and to the Heirs Males of the Body of ſuch Heir Male; there is an Eſtate only for Life in *A.* and a contingent Remainder in his Heir, as a Purchaſer, which veſts *eo inſtante* that 1 Rep. 66, 67. Archer's Caſe. Gil Law of Uſes 24. 1 Inſt. 22. b.

that the particular Eſtate determines; for though there be an Eſtate for Life in *A.* yet the Remainder is limited to his Heir only, in the ſingular Number; and Heir in the ſingular Number only, is a Word of Purchaſe, and not of Limitation.

Gil. Law of Uſes 24. 1 Inſt. 8. b.

60. Likewiſe if an Eſtate be limited to a Man *and* his Heir, he has only an Eſtate for Life; for it cannot go in perpetual Poſſeſſion, becauſe no more Repreſentatives than one only is expreſſed. The Heir cannot take by Way of Remainder, becauſe it is limited by a Conjunction Copulative; and a Joint-tenant he cannot be, becauſe *nemo eſt Hæres viventis.*

Id. Ibid.

61. But if one *deviſes* an Eſtate to a Man and his Heir, a Fee-ſimple paſſes, and Heir there is taken as *nomen collectivum*, to anſwer the Intent of the Party, which appears to be, that he intended to paſs a Fee, as if it had been limited to the Deviſee and his Heirs for ever.

Gil. Law of Uſes 24. 2 Vent. 311. Burchett *v.* Durdant.

62. So if an Eſtate be deviſed to *A.* during the Life of *B.* in Truſt for *B.* and after the Deceaſe of *B.* to the Heirs Males of the Body of him the ſaid *B.* now living; that is a Remainder veſted in the Heirs of *B.* for Heir now living, in that Deviſe, muſt be taken as a Periphraſis of the Heir apparent, who is called Heir in Law, as may be obſerved by the Words *quare Filium & Hæredem rapuit.*

63. The next Property of an Uſe is,

3. That it is deviſeable.

Treatiſe of Tenures 77. 1 Rep. 123. b. Gil. Law of Uſes 35. But by 32 H. 8. c. 1. and 34 H. 8. c. 5. Lands, &c. are deviſable by Will.

64. The Reaſon why Lands were not originally deviſeable, was, becauſe the Ceremony of *Livery* was required to the Tranſmutation of the Poſſeſſion, which is not neceſſary to the Diſpoſal of an Uſe; for Livery is to give Notice againſt whom the *Præcipe* is to be brought, and the *Præcipe* is only of an Eſtate of Freehold.

6 Rep. 18. Sir Edw. Clere's Caſe. 1 Inſt. 111. b. Bulſ. 200. Semain's Caſe.

65. If a Man makes a Feoffment in Fee to the Uſe of his laſt Will, the Feoffor has it to the Uſe of himſelf and his Heirs; for until a Man has actually diſpoſed of the Uſe, the Uſe is in him only; and if he deviſes, the Parties muſt claim their Intereſt by the Deviſe.

6 Rep. 18. Sir Edw. Clere's Caſe. 1 Inſt. 111. b. Gil Law of Uſes 33.

66. But if a Man makes a Feoffment in Fee to the Uſe of ſuch Perſon and Perſons, and of ſuch Eſtate and Eſtates as he ſhall appoint by his laſt Will; there by the Words of the Conveyance he has a *qualified Fee*, till Declaration and Limitation according to his Power reſerved; and it is only the Office of the Will to nominate; for the Intereſt is transferred and diſpoſed of by the Feoffment. But where there are no Words of Diſpoſition, *&c.* in the Feoffment, there the Parties muſt claim by the Deviſe.

4 Rep. 23. Copyhold Caſes. 1 Leon. 174. Bulleyn and Graunt's Caſe. Cro. El. 441. Fitch *v.* Hockley.

67. If a Copyholder ſurrenders to the Uſe of his laſt Will, the Land is ſtill in the Copyholder, and he may diſpoſe of it by an Act in his Life-time; if he does not, by any Will, it ſhall go to his Heirs; if he makes a Will it paſſes by the Surrender, and not by the Will; for the Property of the Copyhold is not altered by a private Act of the Tenant, but by an open and ſolemn Act in the Lord's Court; but at Common Law the Uſe of the Land may paſs by a Deviſe, as is ſaid; and the Freehold itſelf ſince the Statute.

Hob. 349. Earl of Ormond's Caſe. Gil. Law of Uſes 36.

68. Alſo if a Man ſuffers a Recovery to the Uſe of his laſt Will, he may diſpoſe of the Eſtate by a *Conveyance de novo* during his Life; but he cannot during his Life limit new *Uſes* on the *old Recovery*, ſo as to be thereby bound from any Alteration; becauſe the whole Intereſt of the Recovery was declared to be to the *Uſe* of his *Will*; which is changeable in it's Nature.

69. Likewiſe

69. Likewiſe if a Man makes a Feoffment in Fee to the Uſe of his laſt Will, and in the Deed he expreſſes the *Uſe* of the Will to be to himſelf for Life, and then to his Son in Tail, and afterwards makes a Leaſe for Years, and dies; this ſhall bind the Son; for it being expreſsly declared to the Uſe of his Will, it ſuppoſes a Power in him to change it. Bro. F. al Uſes 337. ſ. 1. 19 H. 8. c. 12. But where the Uſe is declared upon the Livery without the Word Will, there he cannot alter his Will. Bro. *loc cit'*.

70. If *Ceſtui que Uſe* deviſes, that his Feoffees may alien the Land to *J. S.* the Feoffees may enfeoff *B.* and *B.* may alien to *J. S.* B. F. 338. ſ. 12.

71. Likewiſe if *Ceſtui que Uſe* deviſes, that his Feoffees ſhould alien the Land for Payment of his Debts, the Creditors may compel him in the Court of Chancery to do it. Ibid.

72. So alſo if *Ceſtui que Uſe* deviſes, that his Feoffees ſhould alien the Land, the Heir ſhall take the Profits till Alienation, and if they do not alien, he ſhall have the Land for ever. Ibid.

4. That it is not extendible or Aſſets.

73. The Reaſon why an Uſe was not extendible is, becauſe there is no Proceſs at Law but upon Eſtates at Law; and Uſes are merely Creatures of Equity, on which the Common Law can award no Execution, and they were not *Aſſets*, becauſe they go in the Courſe of Inheritance; and not to Executors. 1 Rep. 121. b. Chudleigh's Caſe. 1 Ch. Caſes 14. Bennet *v.* Box. Id. 128. Pratt *v.* Colt.

74. But if a Term be limited to attend a Fee Simple, this ſhall be Aſſets for the Payment of juſt Debts; for the Court of Chancery will not carry it out of its due Courſe, where there is any Prejudice or Inconvenience. Hardr. 489. The Attorney General *v.* Sir Geo. Sands.

75. Likewiſe by the Stat. of *R.* 3. it is held extendible upon a Statute Staple or Merchant; for this is in the Nature of a Grant, or Leaſe for Years; and Grants of Leaſes are made good againſt *Ceſtui que Uſe* and the *Feoffees*, by the Statute. Bro. F. al Uſes 339. ſ. 25. 1 Co. 131. b. Chudleigh's Caſe.

76. But ſince the Statute of Frauds and Perjuries, Uſes ſeem to be Aſſets in the Heir for the Payment of juſt Debts, the Heir being obliged to pay all juſt Debts out of a real Eſtate that deſcends from the Anceſtor. 1 Chan. Rep. 128. Pratt *v.* Colt. Gil. Law of Uſes 38.

5. That it is not forfeitable.

77. An Uſe in Fee could not be forfeited for Felony; for in Caſe of Felony the Lands are caſt on the Lord of whom they are holden, for want of Heirs; but an Uſe is holden of no Body. Hard. 466, 7, 488, 489. Gil. Law of Uſes 38.

78. Neither could it be forfeited for Treaſon; for all Tenures are forfeited by the Breach of Fidelity and Duty owed to the Lord; for under that Condition the Tenants take their Eſtates, and conſequently all Breaches of Allegiance forfeit the Eſtate to the King, ſince it originally came from him, conſequently the Eſtate which is holden may be forfeited; but an Uſe is holden of no Body. Hard. 492, 495. Gil. Law of Uſes 39. But the Law in this Point is altered by 26 H. 8. c. 13. 33 H. 8. c. 20. And ſee Hale's P. C. Vol. 1. 240, 247. *& ſequent'*.

79. But if a Term be limited in Truſt, and *Ceſtui que Truſt* commits Treaſon or Felony, the Term is forfeited; for the perſonal Property goes with the Perſons; and when the Poſſeſſion is forfeited, the Party is incapable of perſonal Property, conſequently the Right is in the Publick, and the King has the Uſe of the Term in this Caſe. Allen 16. Holland's Caſe. Hard. 466, 495. Gil. Law of Uſes 39.

80. Yet

Hard. 495. Attorney-General *v.* Sands. Gil. Law of Uſes 39.

80. Yet if a Term be limited to attend the Inheritance in Truſt, it is not forfeited for Felony, becauſe it does not veſt in his Perſon and go to his Executors, but belongs to the Inheritance, like the Charters which are not forfeited.

And. 294. Pl. 302. Sir Francis Inglefield's Caſe.

81. But no Uſe can be forfeited at this Day, unleſs it be of a Chattel or a Leaſe, for all Uſes of Franktenement are, by the Statute of 27 *H.* 8. executed in Poſſeſſion, as will be ſhewn hereafter; and ſo there is no Uſe which can be forfeited, and it would be in vain to give Uſes where no Uſe exiſts at the Time.

6. A Woman is not dowable of an Uſe.

1 Rep. 122. a. Gil. Law of Uſes 25. Neither can a Huſband be Tenant by the Curteſy of an Uſe. 1 Rep. 122.

82. A Feme was not dowable of an Uſe, for the Privilege of Dower was only to Freeholders Wives; now an Uſe, being no Freehold, was not within that Law, and the Chancery allows the Feoffees to be ſeized to Nobody's Uſe, but thoſe that are particularly named in the Truſt.

4 Rep. 1. b. Vernon's Caſe. After the 27 H. 8. for transferring Uſes into Poſſeſſion, the Wives would have been intitled to their Dower of the Huſband's Seizin, as well as to their Jointure, which occaſioned the adding of the Branch concerning Jointures to the 27 H. 8. See Title *Jointure* Vol. 3. p. 220.

83. And that being the Caſe, it became a Practice; for the Father and Friends of the Woman, to procure the Huſband to take an Eſtate from the Feoffees, or others ſeized to his own Uſe, for Life; and then to the Uſe of his Wife, for Life, before or after the Marriage; which was the Original of Jointures.

(C) Of the Inconveniences of Uſes.

1. SUCH was the Nature, Property, and Operation of Uſes at Common Law, and ſince the Stat. of *R.* 3. and though theſe Uſes had a very equitable Beginning; yet, like all new Models of general Schemes of ordering Property, they introduced a great many unforeſeen Inconveniencies, and ſubverted in many Inſtances the Inſtitution and Policy of the Common Law. For—

See the Preamble to Stat. 27 H. 8. c. 10. 1 Rep. 123, 4.

2. Eſtates paſſed by Way of Uſe, from one to another, by bare Words only, without any ſolemn Ceremony or permanent Record of the Tranſaction; whereby a third Perſon that had Right knew not againſt whom to bring his Action.

1 And. 323. Poph. 73. Gil. Law of Uſes 72.

3. Uſes likewiſe paſſing by Will, the Heirs were diſinherited by the inadvertent Words of dying Perſons. Lords alſo loſt their Wardſhips, Reliefs, Marriages and Eſcheats; the Truſtees letting *Ceſtui que Uſe* continue the Poſſeſſion; whereby the real Tenants that held the Lands could not be diſcovered. The King likewiſe loſt the Eſtates of Aliens and Criminals; for they made their Friends Truſtees, who kept Poſſeſſion, and ſecretly gave them the Profits ſo as the Uſe was undiſcovered. Purchaſers were unſecure; for the Alienation of *Ceſtui que Uſe* in Poſſeſſion was at Common Law a *Diſſeizin*, and though the 1 *R.* 3. *c.* 1. gave him Power to alien what he had; yet the Feoffees might ſtill enter to reveſt a Remainder or contingent Uſe, which were never publiſhed by any Record or Livery, whereby the Purchaſer could know of them. Eſtates likewiſe created by Law in Conſideration of Marriage, ſuch as Tenancies in Dower and by

by Curteſy, were defeated, notwithſtanding the 1 *R.* 3. Add to theſe, that the Uſe was not ſubject to the Payment of Debts, and that many loſt their Rights by Perjury, in Averment of ſecret Uſes. And laſtly that *Uſes* might be allowed in Mortmain.

4. To remedy theſe Inconveniencies, the Legiſlature framed the Stat. of 27 *H.* 8. *c.* 10. which leads us to conſider,

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(D) Of the Alterations introduced with reſpect to Conveyances to Uſes by the 27 H. 8. c. 10. which

1. ENACTS, that, *Where any Perſon* ‖ *or Perſons ſtand or be* * *ſeized, or at any Time hereafter ſhall happen to be ſeized of or in any Honours, Caſtles, Manors, Lands, Tenements, Rents, Services, Reverſions, Remainders, or other Hereditaments,* † *to the Uſe, Confidence or Truſt, of any other Perſon or Perſons, or of any Body Politick, by Reaſon of any Bargain, Sale, Feoffment, Fine, Recovery, Covenant, Contract, Agreement, Will, or otherwiſe by any Manner of Means whatſoever it be; in every ſuch Caſe, all and every ſuch Perſon and Perſons, that have or ſhall have any ſuch Uſe or Truſt in Fee-Simple, Tail, for Life, or Years, or otherwiſe, or any Uſe, Confidence, or Truſt in* ‡ *Remainder or Reverter, ſhall from henceforth ſtand and be ſeized. And be deemed and judged in lawful Seiſin, Eſtate and Poſſeſſion* § *of and in the ſame Honours,* &c. *to all Intents,* &c. *of and in ſuch like Eſtate as they had or ſhall have in the Uſe,* &c. *of and in the ſame; and the Eſtate, Title, Right and Poſſeſſion of ſuch Perſon or Perſons as were or hereafter ſhall be ſeized of any Lands, Tenements, or Hereditaments, to the Uſe, Confidence, or Truſt, of any ſuch Perſon or Perſons, or of any Body Politick, be from henceforth clearly deemed and adjudged to be in him, or them that have, or hereafter ſhall have any ſuch Uſe, Confidence or Truſt, after ſuch Quality, Manner, Form, and Condition as they had before in or to the Uſe, Confidence, or Truſt that was in them.*

‖ 27 H. 3. c. 10. The Word (Perſon) excludes all Corporations. Lord Bacon's Reading on the Statute of Uſes 334, 335.

* This Word (ſeized) excludes Chattles and Rights. It likewiſe excludes contingent Uſes, becauſe the Seiſin cannot be but to a Fee-Simple or an Uſe; and when that is limited, the Seiſin of the Feoffee is ſpent. Ld. Bacon's Reading on the Statutes of Uſes 355.

† This Word (Hereditaments) is to be underſtood of thoſe Things whereof an Inheritance is in *Eſſe*; for if I grant a Rent-Charge *de Novo* for Life to an Uſe, this is good enough; yet there is no Inheritance in Being of this Rent. It likewiſe excludes Annuities and Uſes themſelves; ſo that an Uſe cannot be to an Uſe. Ld. Bacon's Reading on the Statute of Uſes 335.

‡ The Statute having ſpoken before of Uſes in Fee-Simple, in Tail, for Life or Years, addeth, or otherwiſe (in Remainder or Reverter) whereby it is manifeſt, that the firſt Words are to be underſtood of Uſes in Poſſeſſion. Ld. Bacon's Reading on the Statute of Uſes 337.

§ The Words (lawful Seiſin, State and Poſſeſſion) intended not a Poſſeſſion in Law only, but a Seiſin in Tail; not a Title to enter into the Land, but an actual Eſtate. Ld. Bacon's Reading of the Statute of Uſes 338.

2. S. 2. *Where divers Perſons ſhall be jointly ſeized to the Uſe or Truſt of any of them, thoſe which ſhall have ſuch Uſe or Truſt, ſhall be adjudged to have only ſuch Eſtate, Poſſeſſion, and Seiſin of the Lands,* &c. *as they had in the Uſe or Truſt, ſaving to all Perſons other than thoſe which be ſeized to any Uſe or Truſt, all Right,* &c.

Upon this saving Clause the following Case has been determined. The Husband being seized in Fee made a Lease to *O.* and *S.* but it was in secret Confidence for the Preferment of his Wife; and afterwards he made a Feoffment to *O.* and others of the same Land to other Uses. It was decreed by the Advice of *Wray*, *Anderson* and *Manhood*, that the Term was not extinguished by this Feoffment, by Reason of the Proviso; and because *O.* had this Lease to his own Use, it is not extinguished by the Feoffment which he took to the Use of another. Mo. 196. pl. 345. Cheyney's Case. 2 And. 192. pl. 9. S. C. says the Lease was made really in Trust to the Use of the Wife, and Education of their Sons and Daughters, notwithstanding that divers Covenants were therein contained, and a Rent was reserved; and says that the Feoffment made afterwards was to the Use of the Husband himself, and his said Wife for their Lives, with Remainder over; and that the same was held accordingly.

3. S. 3. *Also saving to all those Persons which shall be seised to any Use, all such former Rights as they might have had to their own proper Use.*

A Man, in Consideration of natural Love and Affection, covenanted to stand seized to the Use of himself for Life, the Remainder to *B.* his Son in Tail, and to the Intent that *B.* should have a Rent issuing out of the Lands, during the Life of *A. B.* the Son dies and his Executors brought Debt for the Arrears of the Rent. It was resolved and adjudged, that by these Words of the Statute *B.* in this Case had a good Rent, as well upon Covenant as by a Feoffment, or Bargain and Sale. Sir W. Jo. 179. Rivetts *v.* Godson.

4. S. 4, 5. *Where any be seised to any Use or Intent that another shall have a yearly Rent out of the same Lands*, Cestui que Use *of the Rent shall be deemed in the Possession thereof of like Estate as he or she had that Use.*

Vaugh. 50. Dixon *v.* Harrison. Notwithstanding this Statute, there are, as will be shewn more particularly, three Ways of creating an Use or a Trust which still remains as at Common Law, and is a Creature of the Courts of Equity, and subject only to their controul and Direction. 1st. Where a Man seized in Fee raises a Term for Years, and Limits it in Trust for *A.* For this the Statute cannot execute, the Termor not being seized. 2dly. Where Lands are limited to the Use of *A.* in Trust, to permit *B.* to receive the Rents and Profits; for the Statute can only execute the first Use. 3dly. Where Lands are limited to Trustees to receive and pay over the Rents and Profits to such and such Persons; for here the Lands must remain in them to answer these Purposes; and these Points were agreed to. 1 Abr. Equ. Cases 383. Simpson *v.* Turner.

5. The Design of this Law was utterly to abolish and destroy that pernicious Way of Conveyance to Uses; and the Means they took to do it was to make the Possession fall in with the Use in the same Manner as the Use was limited; and where they were all Freeholds, it was thought they would be then subject to the Rules of Common Law; but the Method has not answered the Legislature's Intent; for it has introduced several Sorts of Conveyances quite opposite to the Rules of Common Law; for now, wherever an *Use* is raised, the Statute gives *Cestui que Use* the Possession; so that it is only necessary to form an *Use*, and the Possession passes, without any Livery or Record, and the Reversions, without the Attornment of particular Tenants; and now the Use (by the Name of Trust, which were one and the same before the Statute) remains separately in some Persons, and the Possession separately in others, as it did before the Statute, and are not brought together but by Decree in Chancery, or the voluntary Conveyance of the Possessor of the Land to *Cestui que Trust*. So that the principal Use of the Stat. of 27 *H.* 8. especially upon Fines levied to Uses, is not to bring together a Possession and Use, but to introduce a general Form of Conveyance, by which the Conusors of the Fine, who are as Donors in the Case, may execute their Intents and Purposes at Pleasure, either by transferring their Estates to Strangers, by enlarging, diminishing, or altering them, to and amongst themselves, at their Pleasure, without observing that Rigor and Strictness of Law for the Possession of the Conusee, as was requisite before the Statute.

Gil. Law of Uses 75. 1 Rep 87. b. Before the Statute the Word *Heirs* was not necessary to create an Inheritance in an Use, but now Uses are turned into Possession, they are governed by the Rules of Possessions at Common Law. See *ante* P. 349. with Respect to the Descent of Uses.

6. But before we consider the particular Alterations introduced in the Mode of conveying Property by the 27 *H.* 8. it may be necessary to premise in general, that, since the Statute, the Limitation of Uses is in many Cases governed by the Rules of Law. As if a Feoffment is made to the Use of *J S.* and his Heirs Males lawfully begotten, with Remainder over; this

the

does not paſs an Eſtate *Tail*, but a *Fee-Simple*, ſince the Statute; for ſince the Statute has brought Uſes into Poſſeſſion, they ought to be governed by the Rules of Eſtates in Poſſeſſion, as to the Words that are eſſential to the creating ſuch Uſes. Now if there be no Words eſſential to the creating of an Eſtate, there is no ſuch Eſtate at Common Law, and the Statute has not abrogated the Common Law ſo far as to allow an Eſtate in Being, without Words neceſſary to create it; and here Nobody is limited from whence the Heirs of the Tail may proceed. Alſo no Fee Simple can be created in Uſes, without the Word Heirs, ſince the Statute, for the ſame Reaſon.

7. So if a Man makes a Feoffment to the Uſe of himſelf for Years, the Remainder to *B.* in Tail, Remainder to his own Right Heirs, and after *B.* dies without Iſſue, living the Feoffor, the Remainder to his right Heirs is void, becauſe it being contingent, there is no Eſtate of Freehold to ſupport it, for there is no *Tenant to the Præcipe*, and the not having a perpetual Tenant to the *Præcipe* was an Inconvenience the Statute expreſly deſigned to redreſs, and conſequently to this Rule the Statute has ſubmitted all Uſes.

2 Roll. Abr. 791. Gil. Law of Uſes 76. Gilbert makes a Q. whether to make this Remainder contingent, the Limitation ſhould not be to the Uſe of *A.* for Years, Remainder to *B.* in Tail, Remainder to the Right Heirs of *C.* for the Caſe as above reported in Rolls, does not appear to be contingent Remainder.

8. Likewiſe if a Man makes a Feoffment in Fee to the Uſe of *A.* for Life, the Remainder to his firſt Son in Tail, the Remainder to *B.* in Fee; if *A.* dies, his Wife being *privement Enſient*, and a Son is afterwards born, he ſhall take nothing; for if the Remainder does not veſt at the Determination of the particular Eſtate, it ſhall never veſt; for, as it is ſaid before, the Statute does not change the Nature and Being of Eſtates that were ſettled at Common Law, and a Remainder *ex vi Termini* ſuppoſes a particular Eſtate, of which it doth remain.

Gil. Law of Uſes 77. But ſee 10 & 11 W. 3. c. 16. for preſerving contingent Remainders to after born Children.

9. So if a Man makes a Feoffment in Fee to the Uſe of *A.* his Son for Life, and afterwards to the Uſe of every Perſon that ſhall be his Heir, for Life only, it is not good to the Heir; for it is againſt the Rules of Common Law, that a perpetual Freehold for Life only ſhould deſcend, becauſe it creates a Perpetuity; but it ſeems in this Caſe, as if the Chancery (ſince there is ſuppoſed a good Conſideration) would have executed a Fee in *A.* according to the Intent of the Parties.

1 Rep. 138. a. Chudleigh's Caſe. Gil. Law of Uſes 77. If ſuch a Limitation were good, the Inheritance would be in Nobody.

10. In ſome Caſes however the Statute operates againſt the Rules of Law. As,

11. If a Man makes a Feoffment in Fee, to the Uſe of *A.* in Fee; but upon Payment of 100 *l.* or any other Contingency, to the Uſe of *B.* in Fee, if the Contingency happens, the Fee ſhall be executed in *B.* for though according to the Rules of Common Law, a Fee cannot be limited on a Fee, becauſe a Fee-Simple is the largeſt Eſtate than can be limited; and therefore will not bear a Remainder over, by way of Limitation; and though this cannot be conſtrued a conditional Eſtate; becauſe to avoid Maintenance, the Common Law allows no Stranger to take Advantage of a Condition: Yet the Neceſſities of Commerce and Family Settlements induced the Chancery to paſs by this Rule, and the Statute has executed the Poſſeſſion in the ſame Manner and Form as the Party had the Uſe. Now ſince he had but a conditional Fee in the Uſe before the Statute, he cannot have an abſolute and unconditional Eſtate, ſince the Statute; for that is to ſet up an Eſtate directly contrary to the expreſs Words of the Statute.

Gil. Law of Uſes 78.

12. It has been obſerved that the Statute of the 27 *H.* 8. introduced ſeveral Sorts of Conveyances quite oppoſite to the Rules of Common Law: And this leads us to conſider the ſeveral Sorts of Conveyances to Uſes, with their reſpective Operations.

(E) Of the ſeveral Sorts of Conveyances to Uſes.

2 Sid. 158. Heyns v. Villars.

1. THERE are but three Sorts of Conveyances to Uſes; the two firſt of which only will feed a contingent Uſe, *viz.* 1. Feoffment, Fine or Common Recovery to Uſes. 2. Covenant to ſtand ſeized to Uſes. 3. Bargain and Sale to Uſes. By this laſt Conveyance only no contingent Uſe can be ſupported.

Plow. 301. Sharrington v. Storton. The Covenantee or Bargainee cannot have the Land becauſe they had not Livery of Seiſin, therefore Reaſon veſts the Uſe in them, which is but a Right in Conſcience to have the Profits. Plow. *loc. cit'*.

2. It is to be obſerved concerning the Operation of theſe Conveyances, that by thoſe under the firſt Diviſion, ſuch as *Feoffment*, *Fine*, or *Common Recovery*, Uſes are raiſed by Tranſmutation of Poſſeſſion; but by the ſecond and Third, that is, by *Covenant to ſtand ſeized*, and by *Bargain and Sale*, Uſes ariſe without Tranſmutation of Poſſeſſion, for the Poſſeſſion is ſtill retained by the Covenantor or Bargainor, but for the Uſe of another. Therefore,

1. Of thoſe which raiſe Uſes by way of Tranſmutation of Poſſeſſion, ſuch as, 1. Feoffment. 2. Fines. 3. Recoveries.

* See Vol 2. under their reſpective Titles.

3. The general Nature and Effect of theſe ſeveral Aſſurances have been already explained under their reſpective Titles.* It may not be improper here however to take Notice of this general Rule, *viz.* That

Per Holt, C. J. 12 Mod. 161, 162. and 1 Rep. 176. Mildmay's Caſe.

4. On theſe Conveyances which raiſe Uſes by Way of Tranſmutation of Poſſeſſion, no Conſideration is neceſſary.

Moor 102. pl. 247. Calthorp's Caſe.

5. An Uſe declared on an Eſtate executed, needs no Conſideration. It may be added, that when an Uſe ariſes upon a Conſideration, the Conſideration muſt be preſently executed. Arg. Cart. 140 in Caſe of Garniſh *v.* Weatworth. On the other Hand, it has been argued, that if *J.* covenant to ſtand ſeized to the Uſe of *J. S.* and his Heirs, in Conſideration that he ſhall be my Counſellor, it is good, and the Land paſſed preſently, though it is not executed. Arg. Cart. 142. ſays this Caſe was put by *Popham* in B. R. in one *Pepplewell*'s Caſe.

6. It remains in the next Place to conſider,

Of Deeds declaring the Uſes of Feoffments, Fines and Recoveries.

1 Rep. 176. Mildmaye's Caſe.

7. And herein it is to be premiſed, that Uſes may be declared or averred on a Feoffment, Fine or Recovery of Land; but on a Bargain and Sale of Land no Uſe may be declared or averred, but what the Law doth make.

Id. Ibid. Dyer 169. pl. 21.

8. Likewiſe on a Covenant to ſtand ſeized to Uſes, no Uſe may be declared or averred but what is contained within the Deed. It remains therefore to conſider,

9. 1. Who may declare Uſes. 2. To whom they may be declared. 3. In what Manner they may be declared. 4. At what Time they may be declared. 5. In what Caſes Averments may be made of Uſes.

1. Who

1. Who may declare Uſes.

10. As the Court of Chancery does not ſet up Rules of Property contrary to the Rules of Law, they who have not a diſpoſing Power by the Law cannot raiſe an Uſe; and conſequently Baron and a Feme Covert cannot declare Uſes upon a Feoffment ſo as bind the Wife. Gil. Law of Uſes 39.

11. But Baron and Feme may levy a Fine which will bind the Wife; for here the Law allows her a diſpoſing Power, becauſe ſhe is privately examined, conſequently the Chancery muſt allow them to declare what is the Deſign of that Fine, and therefore ſuch Declaration by them both ſhall bind the Wife. Moor 197. 2 Rep. 57. a. Beckwith's Caſe. 2 Roll. Abr. 798.

12. Likewiſe if the Huſband only declares the Uſes, this ſhall bind the Wife; for ſince ſhe joins in the Fine, ſhe muſt be preſumed to concur in the Deſign of that Fine; unleſs the contrary appears by ſome manifeſt Sign of Diſſent. 2 Rep. 57. a. Roll. Abr. 798.

13. But if the Huſband declares the Uſes of the Fine one way by Deed, and the Wife another way by Deed, this binds the Huſband during the Coverture, but not the Wife afterwards; for the Huſband cannot declare the Uſes without Concurrence of the Wife, becauſe he has no Eſtate; and ſhe cannot be preſumed to concur where the contrary appears by her Deed; and ſhe cannot declare the Uſes alone, becauſe during Marriage ſhe is not *ſui juris*, and without the Huſband ſhe has no diſpoſing Power: And if there be no Uſe declared upon this Fine, it is to the Uſe of the Wife; for where there is no other Intent of a Fine declared, it is ſuppoſed to be deſigned as a farther Security to the preſent Poſſeſſor; and the Uſe is ſtill in the Wife, ſince in this Caſe ſhe has not departed with it. 2 Rep. 57. Moor 197. Beckwith's Caſe. Quære Whether the Declaration be not merely void. Gil. Law of Uſes 40. A Fine ſhall bind the Wife though ſhe be within Age;

but it is ſaid that ſuch a Fine is reverſable for the Nonage of the Wife during her Nonage. Cro. Eliz. 129. Charnoicke & Ux' v. Worſley. 2 Rep. 77. b. Ld. Cromwell's Caſe. Gil. Law of Uſes 41.

A Man of *non ſane Memory* may declare the Uſe of a Fine levied. 2 Rep. 58. a. Beckwith's Caſe. So an Infant may limit an Uſe upon Feoffment, Fine or Recovery, and he cannot countermand or avoid the Uſe, without firſt avoiding the Conveyance. Ld. Bacon on the Statute of Uſes 355.

14. It is obſerveable in general, that every Man may declare and diſpoſe of the Uſe according to the Eſtate and Intereſt he has in the Land; and therefore if two Jointenants levy a Fine, and declare the Uſes ſeverally, each Man diſpoſes of his own Moiety; but if they declare no Uſes they are ſeized as before. Id. Ibid.

15. So if Tenant for Life and he in Remainder in Fee join in a Fine, without declaring any Uſes, they are ſeized as they were before. Id. Ibid.

16. Alſo if *A.* ſeized of certain Lands, and *B.* a Stranger join in a Fine, without Conſideration, it ſhall be to the Uſe of *A.* for ſince there is no Conſideration to part with the Land, the Uſe is ſtill in him. Id. Ibid.

17. In like Manner if *A.* ſeized in Fee of certain Lands, and *B.* a Stranger join in a common Recovery, without declaring any Uſes, the Uſe ſhall ariſe to him that had the Intereſt in the Land, and not to the Stranger. 2 Roll. Abr. 789.

18. So where the Father was Tenant for Life, Remainder to the Son in Tail. A *Præcipe* was brought againſt the Father who vouched the Son and a common Recovery was had; and the Indenture recited, that the Recovery was made between the Father and others; but in as much as no Proof was of the Conſent of the Son to ſuch Declaration, nor was he Party to the Indenture, the Court directed the Jury to find the Uſes according to the Eſtate which the Parties had at the Time of the Recovery.* Lat. 82. Argol v. Cheney. Palm. 405. S. C. Noy 77. S. C.

*See farther Letter (I) Of *Reſulting Uſes.*

2. To whom they may be declared.

Gil. Law of Uſes 43. By Roll C. J. The Chancery cannot compel one

19. An Uſe, it is ſaid, cannot be raiſed to Aliens. For an Alien could not compel the Feoffees to execute an Uſe; for it is contrary to the Policy of the Law that an Alien ſhould plead, or be impleaded, touching Lands, in any Court of the Kingdom.

to execute a Truſt for an Alien. Sty. 21. The King *v.* Holland. All. 15 & 16. But according to *Brooke* a Feoffment or Gift to the Uſe of an Alien born is good, for an Uſe is only a Matter in Conſcience. Br. Feoffment to Uſes Pl. 29.

All. 15&16. Sty. 40. Gil. Law of Uſes 43. But in this Caſe, it is ſaid the King ſhall not

20. The King ſhall have the Uſe of an Alien; for the Advantage which a Man receives from his Duty can extend no farther than the Obligation of that Duty reaches, but the Allegiance of an Alien is temporary, therefore ſo is his Property; and ſince he is incapable of perpetual Subjection, he cannot be protected in any Eſtate that is of perpetual Continuance; and the Inconvenience is the ſame if this be a Freehold at Law, or a Truſt.

ſeize the Land of an Alien, unleſs it be executed in him by a Decree in Chancery; for there was no Right in *Ceſtui que Uſe* himſelf, to ſeize the Lands without a Decree, and the King has only the Rights of the *Ceſtui que Uſe*. Sty. 40. Gil. Law of Uſes 44.

Gil. Law of Uſes 44.

21. Alſo though the King cannot have Feoffees to his Uſe, becauſe he cannot take but by Matter of Record, yet he may take it when the Uſe is found of Record, where an Office is found of the whole Matter.

Bro. F. to Uſes pl. 29. 1 Rep. 23, 24 & 25. Gil. Law of Uſes 44.

22. Likewiſe the Limitation of an Uſe to the Poor of the Pariſh of *Dale*, is Good, though no Corporation; for though they are capable of no Property at Common Law, in the Thing truſted, becauſe the Rules of Pleading require Perſons claiming to bring themſelves under the Gift; and no indefinite Multitude, without publick Allowance, can take by a general Name, yet they are capable of a Truſt; for here the Complainants do not derive to themſelves any Right or Title to the Eſtate, but ſhew that it has been abuſed and miſemployed by the Owners, contrary to Conſcience.

3. In what Manner they may be declared.

4 Mod. 269. Jones *v.* Morley.

23. Before the Statute of Frauds, 29 *Car.* 2. *c.* 3. even a Parol Declaration of the Uſes of a Fine was good. And

7 Mod. 76. Shortridge *v.* Lamplugh.

24. Uſes, even ſince that Statute, may be declared by Writing only without any Seal.

Moor 107. pl. 249. Agreed by the Juſtices in Andrew's Caſe.

25. If an Uſe is declared by Indenture, yet the Parties may alter the Uſe by other Indenture at any Time till the Eſtate is executed, and the laſt Indenture ſhall guide the Uſe.

Comb. 429. Jones *v.* Morley. This Writing was only between the

26. Where there is a *Deed*, and a *laſt Writing* by Huſband and Wife, the laſt Writing, though not a Deed, amounts to a ſufficient Declaration of Uſes upon the Fine, the Fine being levied at *a Time different* from the Deed.

Huſband of the one Part, and the Wife of the other Part. But the Deed was between them and others. Carth. 410. S. C. 2 Salk. 677. S. C. 4 Mod. 261. S. C. Parliament Caſes 143. S. C. and Judgment affirmed.

27. A Decla-

27. A Declaration of the Uſe, either *expreſs or in Law*, is ſufficient; as if *A.* covenants with *B.* for Money to do all Acts which *B.* ſhall require for Aſſurance to *B.* and his Heirs, and then levies a Fine to *B.* this Covenant and Fine will give *B.* the whole Land. Hob. 275. Clanrickard's Caſe.

28. Where a Baſtard was ſeized of a Manor and made his Will, by which he deviſes the Manor; and after he made a Feoffment of the ſame Manor to the Uſe of ſuch Perſons, and for ſuch Eſtates as he had declared by his laſt Will, bearing Date, *&c.* though this was now a *countermanded Will*, it was ſufficient to declare the Uſe of the Feoffment, and ſo no Eſcheat. Moor 789. pl. 1090. in the Exchequer Chamber, Huſſey's Caſe.

29. It is not neceſſary in declaring an Uſe, if there be a Tranſmutation of Poſſeſſion, to uſe the very Word Uſe; any Expreſſion whereby the Mind of the Party may be known, that ſuch an one ſhall have the Land, is ſufficient; *per Holt* Ch. J. in delivering the Opinion of the Court. 12 Mod. 162. in Caſe of Jones *v.* Morley.

4. At what Time they may be declared.

30. A Declaration of Uſes may be made either before, or after the Time of making the Aſſurance; for a ſubſequent Declaration, may direct the Uſes of a precedent Aſſurance; and by—

31. 4 & 5 *Annæ* 16. *ſ.* 15. It is enacted that *all Declarations or Creations of Uſes or Truſts of any Fines or common Recoveries manifeſted by a Deed after, the levying or ſuffering thereof ſhall be as good in Law, as if the Act of* 29 *Car.* 2. *c.* 3. *for Prevention of Frauds or Perjuries had not been made.* In an Ejectment on a ſpecial Verdict the following Caſe was determined. *A.* and *B.* his Wife levied a Fine, and four Years afterwards declare the Uſes; in which Deed, are the Words following, *viz.* 'All and every Fine or Fines levied, or to be levied, ſhall be to the Uſes of this Deed.' Holt Ch. J. delivered the Opinion of the Court, that the Uſes were ſufficiently declared; (the Jury having found That the Fine was levied to the Uſes therein declared.) And that, notwithſtanding the Statute of Frauds and Perjuries, a ſubſequent Deed is now as good as it was before the Statute. And that, it was doubtful, whether the Statute extends to *Uſes*, becauſe they are not mentioned there, but only *Truſts*, yet that they took Truſts and Uſes to be the ſame, in reſpect of Truſts in their larger Extent, *&c.* ſo within the Statute of Uſes. Holt's Rep. 733. Buſhel *v* Burland.

32. If *A.* covenants to levy a Fine before ſuch a Day, though the Fine levied *differs from the Indenture* in Time, Place, Quantity of Acres, or in the Perſon that occupied it; yet, when the Fine is levied, it ſhall be intended to be to the ſame Uſes in the Indenture. Arg. 3 Bulſt. 251. Hagervil *v.* Hare, cites 2 Rep. 69. Ld. Cromwell's Caſe. But it may in ſuch Caſe be averred by Parol to be to other Uſes. But if the Fine be levied in all Things purſuant to the Indenture, no Averment can be but by Writing; for in this Caſe, the Indenture is *directory to the Fine*, and in the other Caſe, it is *but Evidence*. Cro. J. 29. Counteſs of Rutland *v.* The Earl of Rutland.

33. If a precedent Indenture be made to direct the Uſes of a ſubſequent Aſſurance, it is but directory till the Aſſurance is made, and then the Land is bound, and the Conuſor or Recoveree cannot by any Act of his, after the Recovery had, charge or avoid it; but if the Declaration be ſubſequent, if in the Interim, between the Aſſurance had and the Declaration of the Uſes, the Conuſor or Recovery ſells, gives or charges the Lands to others, this ſubſequent Declaration will not ſubvert the mean Eſtates, Charges or Intereſts, unleſs it can be otherwiſe proved, that by a certain and compleat Agreement of the Parties, the Aſſurance was had and made to theſe Uſes. 5 Rep. 26. Counteſs of Rutland's Caſe. 9 Rep. 10 & 11, *&c.* Dowman's Caſe.

34. But the Diſtinctions between precedent and ſubſequent Declarations will beſt appear from the Conſideration of the following Head, *viz.*

5. In what Caſes Averments may be made of Uſes.

9 Rep. 10. Dowman's Caſe.

35. With regard to Averments it is to be obſerved, that where an Uſe is expreſſed upon any Feoffment, *&c.* there no Averment ſhall be received to prove any Uſe contrary to the Uſe expreſſed; but in caſe no Uſe is expreſſed in the Aſſurance, there other Uſe than what the Law would make upon the Aſſurance, may be averred, and proved to have been agreed upon, and the Aſſurance ſhall be to ſuch Uſes.

Gil. Law of Uſes 6. 1 And. 313. Where the Deed is not upon a valuable Conſideration, it is looked upon as a fraudulent Conveyance againſt the Truſt.

36. If by the Words of a Deed, upon a valuable Conſideration, a Man takes it to his own Uſe, or to the Uſe of another, there can be no Averment that he takes it as a Truſtee in any other Manner; for there is ſuch a Sanction given to all ſolemn Acts of contracting, that they cannot be conſtrued directly contrary to their own Expreſſions.

Gil. Law of Uſes 7. * It ſeems at Common Law an Uſe might have been raiſed by Word, upon a Conveyance that paſſed the Poſſeſſion by ſome ſolemn Act, as a Feoffment; but where there was no ſuch Act, there it ſeems a Deed Declaratory of the Uſes was neceſſary; for as a Feoffment which paſſed the Eſtate, might be made at Common Law, by Parol; ſo by the ſame Reaſon might the Uſes of the Eſtate be declared by Parol; but where a Deed was requiſite to the paſſing of the Eſtate itſelf, it ſeems it was requiſite for the Declaration of the Uſes, as upon a Grant of Rent, or the like. So it ſeems, a Man could not covenant to ſtand ſeized to an Uſe, without a Deed, there being no ſolemn Act; but a Bargain and Sale by Parol has raiſed an Uſe without, and it has been held to do ſo ſince the Statute. In Cities exempted out of the Statute, it has been held, that if a Fine be levied of a Rent, no Uſe can be limited of it without Deed; but now by 29 Car. 2. c. 3. all Declarations of Truſts, other than ſuch as ariſe by Implication of Law, are to be in Writing, and ſigned by the Party, who is by Law enabled to declare ſuch Truſt, or elſe it muſt be by his laſt Will in Writing. Gil. Law of Uſes 270, 271.

37. Thus if a Feoffee to Uſes makes a Feoffment in Fee by Deed, upon an equitable Conſideration, to *J. S.* and his Heirs, to the Uſe of his Heirs expreſsly, *J. S.* ſhall be ſeized to his own Uſe, though he had Notice of the former Truſt; for where the Deed expreſſes the Uſe, an implied one cannot be averred.*

2 Salk. 676. Tregame *v.* Fletcher.

38. Where the Uſes of a Recovery are declared by Deed precedent, no new or other Uſe can be averred by Parol, unleſs there was ſome Variance between the Deed and the Recovery; but in caſe of a Deed precedent, if the Party ſet up other Uſes, he muſt confeſs and avoid: But where they are by Deed ſubſequent, new or other Uſes may be averred without ſhewing the Deed, though there be no Variance, *&c.* becauſe there was an intermediate Time when there might be ſuch Agreement made, and the Uſes ariſe by the Recovery according to that Agreement; and if a Deed ſubſequent be ſet up, the other may traverſe thoſe Uſes.

39. But where there is a Variance between the Deed and the Recovery or other Aſſurance, and no Averment of the Uſes can be made, there they muſt be left to the Conſtruction of Law.

40. There is a Difference likewiſe with reſpect to Averments between Parties and Strangers. Thus,

Comb. 429. Jones *v.* Morley.

41. If a Declaration of Uſes be ſubſequent to a Fine or Recovery, it is good; but there may be an *Averment*, that they were to *other Uſes*, yet with this Difference, that where the Declaration is ſubſequent, there the Heir of the Conuſor is *eſtopped to aver* other Uſes, but a *Stranger* is not. But where the Deed is precedent, there, neither the Heir nor the Stranger is eſtopped to aver other Uſes, in caſe the *Fine varies in any Circumſtance*; but if the Fine was levied puſuant to the Deed, no Proof whatſoever, either by Writing or Parol, ſhall be admitted, that the Fine was to other Uſes, than what are contained in the Deed, that being an Eſtoppel to the Parties. *Per Holt* Ch. J.

42. It

42. It has been held that a Deed of Uſes *precedent* to a Recovery, may be explained by a Deed *ſubſequent*, as in the following Inſtance—Feme, before the 27 *H.* 8. of Uſes, being ſeized of Land, ſuffered a common Recovery, and intending to marry *A. B.* ſhe, before the Marriage, declared by Indenture that the Feoffees ſhould be ſeized *to the Uſe of herſelf and A. B.* whom ſhe intended to marry, *and their Heirs.* The Feoffees executed an Eſtate after the Marriage to the Huſband and Wife and their Heirs in Fee, without any Uſe expreſſed. Afterwards the Baron and Feme *by other Indenture declared, that the firſt Indenture was miſtaken*; for that it *ſhould have been to the Heirs of their two Bodies*, and for Default *to the Heirs of the Wife.* And they covenant, bargain and *agree, to ſtand ſeized to the Uſe of* themſelves in ſpecial Tail, and after, to the right Heirs of the Wife; and the Huſband covenanted, if the Wife died without Iſſue, during his Life, that he would execute an Eſtate accordingly. The Wife died without Iſſue, and after the Statute of Uſes the Baron died ſeized; and it was held that the *firſt Indenture was corrected by the ſecond*, and the firſt Uſe is ſufficiently altered without Eſtate executed, and the Conſiderations are reaſonable and ſufficient, and adjudged for the Heir of the Wife. Dy. 307. b. pl. 71. Vavaſor's Caſe.

43. A Conſideration which ſtands with the Deed and not repugnant to it, may be averred. 7 Rep. 40. Bedel's Caſe.

44. It now remains to conſider,

2. Of thoſe Conveyances which raiſe Uſes without Tranſmutation of Poſſeſſion, ſuch as,

1. Covenants to ſtand ſeized to Uſes. And 2. Of Bargain and Sale.

1. Covenants to ſtand ſeized to Uſes.

45. This Conveyance not having been hitherto treated of, it will be neceſſary to inquire more fully into its Nature and Effect.

46. The Original of it was in this Manner. Before 27 *H.* 8. When any Man covenanted to ſtand ſeized to the Uſe of another, the Remedy was Two-fold. Gil. Law of Uſes 110.

47. Firſt, by Action at Common Law upon the Covenant, and thereby Damages only were recovered. Id. Ibid.

48. Secondly, In Chancery; and there the Remedy aroſe thus; when any Man covenants to do a Thing, the Party is firſt bound in Conſcience to perform the Thing itſelf; and if that cannot be, then to render Damages for not doing of it; therefore the Chancery that examines the Conſcience of Men's Actions requires a ſpecifick Performance of the Thing itſelf, where it can be had: But the Common Law could not carry this Covenant ſo far without offering Violence to its own Rules; for the Common Law requires Livery; and to allow an Action for a ſpecifick Performance makes the Agreement binding without it; but by the 27 *H.* 8. theſe Uſes are executed, and therefore no Action lies; for there can be no Complaint for not transferring the Thing, when the Statute transfers it to the Party himſelf.

49. For the more clear underſtanding the Nature and Effect of this Aſſurance, we will conſider,

1. Who may covenant to ſtand ſeized and to whom.

2. What Conſideration is neceſſary to a Covenant to ſtand ſeized, and how far it extends.

3. By what Words a Man may covenant to ſtand ſeized.

4. The Effect of a Covenant to ſtand ſeized.

1. Who

1. Who may covenant to ſtand ſeized, and to whom.

Pop. 72. Dillon v. Fraine. Hard. 468. Pawlett v. Attorney General. 1 Roll. Rep. 332. Cooper v. Franklin and another. But ſee Vern. 439. *per* Maſter of the Rolls, in Caſe of Ld. Kildare v. Euſtace, relating to the *Iriſh* Forfeitures, where he ſays he takes the King to be in Nature of a Truſtee, notwithſtanding the general received Opinion to the contrary.

50. The King cannot be ſeized to an Uſe, becauſe there is no Means to compel him to perform; for the Chancery has only a delegated Power from the King over the Conſciences of his Subjects; and the King, who is the univerſal Judge of Property, ought to be perfectly indifferent, and not take upon him the particular Defence of any Man's Eſtate, as a Truſtee.

The King cannot be ſeized to an Uſe, becauſe he cannot be obliged to execute the Poſſeſſion to the Uſe by a Subpœna, ſince if he diſobeys he cannot be compelled to Obedience by Impriſonment. Jenk. 195. pl. 1.

Ld. Bacon on the Statute of Uſes 347.

51. The Queen (ſpeaking not of an Imperial Queen, but by Marriage) cannot be ſeized to an Uſe; though ſhe be a Body enabled to grant and purchaſe without the King, yet, in regard to the Government and Intereſt the King hath in her Poſſeſſion, ſhe cannot be ſeized to an Uſe.

Gil. Law of Uſes 5. 1 Rep. 122. Pop. 72.

52. Bodies Politick are not capable of an Uſe or Truſt, becauſe they are Bodies framed at the Will of the King, and are no further capable than he wills them; and it is his Will that they ſhould purchaſe for the common Benefit, and for the Ends of their Creation, and not that they ſhould take any Thing in Truſt for others; alſo being incorporate, the Chancery had no Proceſs on the Perſons to compel them to diſcharge their Truſt.

Gil. Law of Uſes 5. 1 Rep. 122.

53. Aliens, and Perſons attainted, are not capable of an Uſe, for they can take for no Man's Benefit but the King's.

Pop. 72. The King ſhall have the Uſe of an Alien, becauſe as his Allegiance is temporary, ſo ought his Property to be. All. 15 & 16. Sty. 40. Gil. Law of Uſes 43.

1 Rep. 122. a. 139. b.

54. A Diſſeizor, Abator or Intruder, cannot be ſeized to an Uſe, for they take it under no Truſt, but defeat the Eſtate to which the Truſt was ſubjoined; and the Chancery had no Power to try the Right of Inheritance between them, for the Right of that Title is triable only at Common Law; but if he, who has the Uſe, exhibits a Bill againſt the Feoffee to an Uſe, the Chancery will order him to try the Title with the Diſſeizor at Common Law.

1 Rep. 122. a. Bro. Feoff. 138. a.

55. A Lord by Eſcheat ſhall not be ſeized to an Uſe, becauſe he is in by a Title Paramount, and ſeized of an Eſtate antecedent to that to which the Uſe is annexed. Lord of a Villain, a Lord that entets for Mortmain, or recovers by *Ceſſavit*, or a Tenant by the Curteſy cannot be ſeized to an Uſe, for they claim by the general Laws and Statutes of the Kingdom, which the Chancery has no Power to alter, and do not take as Subſtitutes under thoſe private Contracts, to which Truſts are annexed, and ſo cannot be puniſhed as corrupt Breakers of that Truſt which they never undertook.

Cro. J. 400. Cooper v. Franklin. Het. 110.

56. Tenant in Tail cannot covenant to ſtand ſeized ſo as to change an Uſe, unleſs during his own Life.

Bromfield's Caſe. None can be ſeized to the Uſe of another, but ſuch as can execute an Eſtate according to the Directions of *Ceſtui que Uſe*, which Tenant in Tail cannot; for it was Intent of the Statute *de Donis* that he ſhould have the Lands and the Profits of them; and if he ſhould execute an Eſtate to an Uſe, his Iſſue would be intitled to their Formedon. Br. Feoff. al Uſes, pl. 40. 2 Roll. Abr. 780. 1 Inſt. 19. b. Gil. Law of Uſes 11 & 205, &c.

PerCur. Het. 110 Bromfield's Caſe.

57. If Tenant in Tail by Indenture, on Conſideration of Marriage, covenants with another that *A.* and *B.* ſhall be ſeized to his Uſe for Term of his

his Life, and after his Deceaſe to the Uſe of his Son and Heir apparent: By this Covenant there is no Uſe changed, unleſs only during the Life of Tenant in Tail.

58. So if Tenant in Tail covenants to ſtand ſeized to the Uſe of himſelf for Life, Remainder to his eldeſt Son in Tail; ſince he had only the Power of diſpoſing of an Eſtate for Life, by the Statute *de Donis*, which he hath not paſſed out of himſelf, it is ſtill in him as it was before; and the Remainder is void in its Creation, and therefore there can be no Execution of it, for the Execution muſt be immediate by the Statute of Uſes; and therefore a Fine afterwards levied cannot help it. Cro. Eliz. 895. Bedingfield's Caſe.

59. But if Tenant in Tail covenants to ſtand ſeized * to the Uſe of *A.* and his Heirs, or to the Uſe of *A.* for Life, † Remainder to *B.* in Fee. The Covenant is not void, but puts the Eſtate out of the Covenantor. *Per Holt* Ch. J. in delivering the Opinion of the Court. 2 Salk. 620. Machil *v.* Clark.

* The Covenant is good, and paſſes a baſe Fee to *A.* per Holt Ch. J. Comyn's Rep. 121. pl. 84. S. C.

† And the Remainder is good, though the Tenant in Tail dies during the Life of *A.* until it is avoided by the Iſſue. Comyn's Rep. 121. per Holt Ch. J. in S. C.

60. Yet if Tenant in Tail covenants to ſtand ſeized to the Uſe of *A.* and his Heirs after his Death, it is void. 2 Salk. 620. Machil *v.* Clark.

7 Mod. 26. S. C. & P. becauſe it is to commence at a Time when the Right of the Eſtate out of which it would iſſue, is in another Perſon by a Title paramount the Conveyance, *viz. per formam Doni.*

61. So if Tenant in Tail covenants to ſtand ſeized to the Uſe of himſelf for Life, Remainder to *J. S.* and his Heirs, it is void; for the Remainder is to take Effect after his Death, when by his Death the Title of his Iſſue commences; and the Covenant, as to the Eſtate for Life to himſelf, is void in this Caſe, becauſe there is no Tranſmutation of Poſſeſſion. Such a Covenant is in any Caſe good only in reſpect of the Remainders; and ſince the Remainders are void, the Covenant and the firſt Eſtate are likewiſe void. 2 Salk. 620. Machil *v.* Clark. 7 Mod. 18 to 28. S. C. accordingly.

62. Likewiſe a Tenant for Years, ſince the Statute of Uſes, cannot be ſeized to any Uſe; for a Tenant for Years has only a Poſſeſſion, and not a Seizin which the Statute requires. Jenk. 195. pl. 1.

63. But a Tenant in Dower may be ſeized to an Uſe, for a Tenant in Dower claims by the Marriage Agreement, and a ſufficient Proviſion is made for her by Law, which is a third Part of her Huſband's Eſtate; and ſince a private Contract is the original of her Title, ſhe continues the Eſtate of her Huſband as he purchaſed it, and under the ſame Truſt and Agreement. Hard. 469. Co. Lit. 239. 4 Rep. 122. *contra.* Br. F. to Uſes 338. ſ. 40. On this

Point we find ſeveral contradictory Opinions in the Books. Some ſay that Tenant in Dower claims in the *Per*, that is, by or from her Huſband; according to others, ſhe is in, in the Poſt, and claims by Diſpoſition of Law, and does not come in by Privity of Eſtate. Therefore Q. And conſult the Authorities in the Margin, and ſee farther. Gil. Law of Uſes, pl. 11 & 171.

64. An Occupant alſo may be ſeized to an Uſe, for an Occupant continues the Eſtate of Tenant for Life, as his Subſtitute, and ſo muſt take it as he had it. Hard. 468. But ſee Bro. Feoff. to Uſes 338. a. ſ. 10. *contra.*

65. It is a Rule that a Man cannot covenant that another ſhall ſtand ſeized of Lands whereof the Seiſin is in himſelf, for this will not raiſe any Uſe, but will ſtand merely on Covenant. Thus if *A.* ſeized in Fee, in Conſideration of the Marriage of *B.* his Son, and a Marriage Portion, covenanted to levy a Fine to *B.* and that *B.* ſhould ſtand ſeized to the Uſe of *A.* the Father and his Heirs, till the Marriage had, and after to *B.*'s own Uſe in Tail, with divers Remainders over: And *A.* covenanted in the ſame Deed, that he was ſeized in Fee, and ſo ſhould be till the Uſe veſted in *B.* the Son, 3 Lev. 306. Barrington *v.* Crane.

It

It was reſolved by *Powell* and *Rookſby* J. the only Judges then in Court, that *A.* could not covenant that the Son ſhould ſtand ſeized of Lands whereof the Father is ſeized; and the ſubſequent Covenant was intended againſt Incumbrances only, as is uſual in ſuch Caſes, and not to raiſe any Uſe.

2. What Conſideration is neceſſary to a Covenant to ſtand ſeized, and how far it extends.

Cart. 143. Garniſh *v.* Wentworth.

66. It has been already ſhewn, that on thoſe Conveyances by which Uſes are raiſed by Tranſmutation, no Conſideration is neceſſary; but Conveyances by Covenant to ſtand ſeized, or by Way of Bargain and Sale, will not operate to Uſes without a Conſideration.*

* Conſiderations to raiſe Uſes are Threefold, as Conſiderations of Blood or of Marriage, (which, as will be ſhewn, are good Conſiderations on Covenants to ſtand ſeized,) and Conſideration of Money, which is the only good Conſideration on a Bargain and Sale. See Title *Bargain and Sale*, Letter (D).

Ld. Bacon ſays, there is no Reaſon in the Law why a Deed ſhould not raiſe an Uſe without any Conſideration. But he adds, that it is a Reaſon of Chancery, becauſe no Court of Conſcience will enforce *Donum Gratuitum*. But where Money is paid whereby a Man's Fortune is leſſened, or where it is for the Eſtabliſhment of his Family, then it is good in Chancery. Ld. Bacon's Read. on Stat. of Uſes 310, &c.

67. With Reſpect to Covenants to ſtand ſeized, Conſiderations of Blood or of Marriage, are good Conſiderations to raiſe Uſes.

Gil Law of Uſes 47. Cart. 139. Garniſh *v.* Wentworth.

68. And 1. Of Conſideration of Blood. If a Man parts with any Lands in Advancement of his Iſſue, and to provide for the Contingencies and neceſſary Settlements of his Family, it is fit the Chancery ſhould make them good Conveyances, though they want the Ceremonies of Law; for it is the Deſign and Intent of the Court of Equity to mitigate the Severities of Law, ſo as they may beſt comply with the Peace of Families; for their Eſtabliſhment is Part of the Nature and End of Government.

Id. Ibid.

69. Therefore if a Man, in Conſideration of natural Love and Affection, covenants to ſtand ſeized to the Uſe of his Son or Brother, this is a good Uſe.

2 Roll. Abr. 782, 783. between Bond and Edmonds; *per Curiam*.

70. A Conſideration of natural Affection expreſſed to one Child will, by Conſtruction of Law, be extended to others. Thus if a Man, having Iſſue three Sons, covenants in Conſideration of natural Affection to the eldeſt Son, to ſtand ſeized of certain Land to the Uſe of himſelf for Life, and after to his eldeſt Son and the Heirs Male of his Body; and for Default of ſuch Iſſue to the Uſe of his ſecond Son, and the Heirs Male of his Body; and for Default of ſuch Iſſue to the Uſe of the third Son, *&c.* This is a good Conſideration to raiſe the Uſe to his younger Sons; for though the Conſideration of natural Affection be limited only to the Eldeſt, yet this is equal to all the Sons, and therefore the Law will ſupply it without Expreſſion; for if nothing had been expreſſed, it had been good Conſideration by Implication of Law.

Plow. Rep. 303. Sharington & *al'* *v.* Strotton.

71. The Conſideration of natural Affection is good likewiſe to raiſe an Uſe to Children unborn. Thus Conſideration of Affection to the Heirs Male of the Covenantor which he ſhould beget on the Body of *A.* his Wife is good Conſideration to raiſe an Uſe by way of Covenant to the ſaid Heirs of his Body, for every one is bound in Nature to provide for his Children.

7 Rep. 13. b. [14. a.] Engleſield's Caſe. The Reaſon is,

72. So for Advancement of his Heirs Male, a Man may covenant to ſtand ſeized to the Uſe of himſelf and the Heirs Males of his Body, and this ſhall raiſe a good Eſtate Tail; for though all the Eſtate Tail is in himſelf,

for that a Man may modify a Fee that continues in him, though he cannot take a Fee as *de Novo* when he has the old one in him. Gil. Law of Uſes 209.

yet

yet this is for the Benefit of the Heir Male though it is *in futuro*, and not *in præcenti*, for none can know who ſhall be his Heir; for *ſolus Deus facit Hæredes*.

73. But if a Man in Conſideration of his Care and Love which he bears to *J. S.* called, named and *reputed* one of his Sons (where he was his Baſtard Son) covenants to ſtand ſeized to the Uſe of the ſaid *J. S.* this is no good Conſideration to raiſe any Uſe. 2 Roll. Abr. 785. Dy. 374. pl. 16. Worſeley's Caſe.

The Reaſon is, for that in Law he is not ſuppoſed to be of the Blood of his Father, but is conſidered as a mere Stranger, for whom no one is preſumed to have a natural Affection. See the Caſe laſt mentioned, and ſee Gil. Law of Uſes 48 and 206. But a Baſtard may take by Feoffment, though not by Covenant to ſtand ſeized in Conſideration of natural Affection. 1 Leo. 197. Lord Pagett's Caſe.

74. So likewiſe if a Man covenants, in Conſideration of Blood and of the Marriage of his Baſtard Daughter, to ſtand ſeized to the Uſe of the Baſtard Daughter, this is not a good Conſideration to raiſe an Uſe, becauſe in the Law, ſhe is not his Daughter, but *Filia Populi*. 2 Roll. Abr. 785. between Frampton and Gerard. But if a Man

covenants, in Conſideration of natural Love and Affection, Blood and Marriage of his Baſtard Daughter, to levy a Fine, and that the Conuſee ſhall ſtand ſeized to the Uſe of the Baſtard Daughter, tho' this be not a ſufficient Conſideration to raiſe an Uſe upon a Covenant, yet it is expreſſive of the Intent of the Party, and therefore ſhall ſerve as a ſufficient Declaration of an Uſe upon the Fine, where there needs no Conſideration. Gil. Law of Uſes 207.

75. Fraternal Love, and Continuance of the Land in ſuch of the Blood of the Covenantor, is good Conſideration to raiſe an Uſe by way of Covenant, for this is a Conſideration of Blood, and the Brother is one of the next Degrees after his Parents and Children, and they who are next in Blood, are next in Love, by Intendment of the Law. 2 Roll. Abr. 785. cites Pl. C. 307. Sher and Pled [*v.* Stratton.]

76. Thus if *A.* by Indenture made between him of the one Part, and *B.* his Brother (naming him ſo in the Deed) and *C.* and *D.* who are Strangers to him, in Conſideration of Love and Affection which he bears towards his Wife and Children, and for their Maintenance and Stay of Living, and to the Intent to ſettle his Land in his Name and Blood, covenants with the ſaid *B. C.* and *D.* to ſtand ſeized to the Uſe of himſelf for Life, and after to his Wife for Life, and after to the ſaid *B. C.* and *D.* and their Heirs upon Truſt, that they ſhould make ſuch Uſes as he himſelf ſhall appoint, and after to raiſe Portions for his Children, and after to *G.* his ſecond Son in Tail, *&c.* though no Uſe can ariſe by this Indenture to *C.* and *D.* who are Strangers to the Conſideration of Blood, and ſo this is void as to them; yet the Uſe ſhall ariſe for all to *B.* who is his Brother, and ſo named in the Deed, which is within the Conſideration. *Trin.* 14 *Car.* This was a ſpecial Verdict between *Fox* and *Wilcocks*, and argued at Bar, but it abated by Death. And after upon a new ſpecial Verdict between *Smith* and *Buſbie*, it was adjudged *per Curiam*, that Uſe ſhall well ariſe to *B.* to perform the Truſts ſpecified in the Indenture. 2 Roll. Abr. 783. S. C. Cro. Car. 529. by the Name of Smith *v.* Riſley *& al.* S. C. Sir Wm. Jo. 418. by the Name of German *v.* Riſley.

77. But Conſideration of antient Acquaintance, or of being Chamber Fellows, or entire Friends, ſhall not raiſe any Uſe. Agreed *per Curiam* between *Ward* and *Tuddingham*. 2 Roll. Abr. 783.

78. Alſo if a Man, in Conſideration that *B.* was bound in a Recognizance for him, bargains and ſells Land to the other, that is not good. 2 Roll. Abr. 783. adjudged between Ward and Lumbard.

79. Neither will the Conſideration of a Surname raiſe an Uſe, as was reſolved in Sir *Chriſtopher Hatton*'s Caſe, who had a Siſter's Son called *Newport*, and in conſideration of his changing his Name to *Hatton* he covenants by Deed to raiſe an Uſe to him, this Conſideration was adjudged not ſufficient to raiſe an Uſe. Jenk. 81. pl. 60.

So. 2. With Reſpect to Conſiderations of Marriage—A Man may covenant to ſtand ſeized to the Uſe of *A.* his Wife, and the Conſideration that

that ſhe is his Wife will raiſe a good Eſtate to her, for this is a good Conſideration in Law.

7 Rep. 40. Bedell's Caſe.

81. Thus if an Indenture between *A.* and his Wife of one Part, and *B.* their Son of the ſecond Part, and *C.* their Son of the third Part, the ſaid *A.* in Conſideration of natural Affection and paternal Love which he has to his ſaid Sons, and for their better Advancement, and to the Intent that the Lands ſhould continue in his Name and Blood, covenants to ſtand ſeized to the Uſe of himſelf for Life, the Remainder to his ſaid Wife for Life, the Remainder to his ſaid Sons; here the Uſe limited to the Wife imports a Conſideration of itſelf.

Plow. Rep. 307. Sharington *v.* Strotton.

82. Likewiſe a Man may covenant to ſtand ſeized to the Uſe of *A.* the Wife of his Brother, in Conſideration that ſhe is the Wife of his Brother, and this ſhall raiſe a good Eſtate to her, for the Love which he bears towards his Brother, extends in his Right to his Wife.

Sid. 83. in Caſe of Stephens *v.* Brittridge.

83. So alſo the Conſideration of Marriage *to be had*, will raiſe an Uſe, becauſe the preſent Eſtate is to the Baron, and what is limited to the Feme, is only a Remainder; *per Twiſden* J.

2 Roll. Abr. 786. between Bould and Winſton. Noy 122. S. C. The Wife is within the Conſideration, becauſe the Covenantor intended the Advancement of his Poſterity, and without a Wife, the Son cannot have a lawful Poſterity.

84. Likewiſe if a Man covenants, in Conſideration of natural Love and Affection to his Son, to ſtand ſeized to the Uſe of his Son for Life, the Remainder to ſuch Wife as the Son ſhall afterwards have for Life, the Remainder to the firſt Son of the Son and Wife begotten, *&c.* Though the Wife be a Stranger to the Conſideration (admitting it) yet the Eſtate limited to her is well raiſed for the ſubſequent Eſtate, which is within the Conſideration.

Plow. Rep. 307. Sharington *v.* Strotton.

85. But if a Man, in Conſideration that *B.* ſhall marry his Daughter, covenants to ſtand ſeized to the Uſe of *B.* and his Daughter, the Remainder to *C.* this is a void Remainder to *C.* becauſe he is a Stranger to the Conſideration.

Ow. 85. in Carter *v.* Kingſted.

86. It is to be obſerved farther with Regard to the Extent of theſe Conſiderations, that if a Man covenants upon Conſideration to be ſeized to the Uſe of himſelf for Life, and after to the Uſe of his Son; but he ſays farther, that his Meaning is, that his Wife ſhall have it for her Life; *Per Periam* J. This is not a void Clauſe but good to the Wife.

Cro. J. 180. pl. 19. Croſs *v.* Fauſtenditch.

87. So alſo where *A.* in Conſideration of Love and for ſettling the Land in his Name and Blood to his eldeſt Son, covenants to convey before *Eaſter* in Truſt for himſelf for Life, Remainder to *B.* his eldeſt Son in Tail, *&c.* And alſo covenants to ſtand ſeized from and after *Eaſter*, of ſo much of the ſaid Lands as ſhould not be ſufficiently conveyed, to the ſaid ſeveral Uſes, Intents and Purpoſes, and no Aſſurances were made before *Eaſter*. It was reſolved, that the Uſes and Eſtate raiſed by this Covenant being in Conſideration of Love to his Son, *&c.* (no Eſtate at all being executed before *Eaſter*) the Covenant extended to all, though it was objected that the Words being, that of ſo much of the Lands, *&c.* the Intent was that he would ſtand ſeized when Part was executed and ſufficiently conveyed, but when no Part was executed it was not his Intent that all ſhould be raiſed by Covenant; but this was not allowed, for the Conſideration being ſufficient, the Covenant well extends to all, there being nothing conveyed by the Eſtate executed.

1 Leon. 195. *& ſequent.* Ld. Pagett's Caſe. But ſee Plow. Com. 307. *contra.*

88. There is a Difference between a Covenant to ſtand ſeized and a Feoffment; for if a Man covenants to ſtand ſeized to the Uſe of *A.* a Stranger for Years, *&c.* Remainder to *B.* his Son in Tail, this is void as to *A.* for want of a Conſideration, and the Uſe veſts immediately in *B.* and a void

And a Diſtinction is there taken, that if the Limitation to the Stranger precedes the Limitation to the Blood of the Covenantor, there, it is good to the Stranger, but that if it is ſubſequent, it is void. Therefore Q

Uſe

Uſe is as if no Uſe be limited; and if no Uſe be limited, *B.* muſt take immediately, and not by Way of Remainder, or elſe he cannot take at all; for a Remainder *ex vi Termini* ſuppoſes a particular Eſtate, and *B.* muſt not be excluded, becauſe Uſes being Creatures of Equity, the Parties Intent muſt be made good as far as poſſible, where there is a juſt and good Ground for any Part of the Conveyance. Gil. Law of Uſes 113.

89. But if a Man makes a Feoffment in Fee to the Uſe of *A.* and a Stranger, or Baſtard for Life, the Remainder to his Son in Tail, this is good to *A.* for upon a Feoffment there needs no Conſideration to raiſe the Uſe, as has been ſaid. 1 Leon. 197. Ld. Paget's Caſe.

90. There is another Difference likewiſe obſervable, for if a Man raiſes Uſes upon a Fine, Feoffment, or Recovery, he may reſerve to himſelf a Power of making Leaſes; but he cannot do it on a Covenant to ſtand ſeized, or on a Bargain and Sale; for upon a Fine, Feoffment or Recovery, an Uſe may be raiſed without a Conſideration, and therefore will ariſe to the Leſſees without Conſideration; and the former Eſtates which were raiſed without Conſideration, may be defeated without it; but in a Bargain and Sale, and Covenant to ſtand ſeized, no Uſes will ariſe without Conſideration, therefore not to the Leſſees; for where the Perſons are altogether uncertain, and the Terms unknown, there can be no Conſideration; for which Reaſon the former Eſtates, raiſed upon good Conſideration, cannot by ſuch Leſſees be defeated. 1 Rep. 176. b. Mildmay's Caſe.

3. By what Words a Man may covenant to ſtand ſeized.

91. It is a general Rule, that Words ſhall be conſtrued ſo that the Deed may ſtand, if poſſible. Thus, March. 50.

92. If a Man, in Conſideration of natural Love, and for Augmentation of his Daughter's Portion, gives, grants, bargains and ſells, aliens, enfeoffs and confirms certain Lands to *J. S.* his Daughter, with a ſpecial Warranty, and the Deed is inrolled, this enures by Way of Covenant to ſtand ſeized, in reſpect to the Conſideration. Vent. 138. & *ſequent.* Croſſing *v.* Scudamore.

93. But if the Conſideration be not expreſſed in the Deed, it ſeems no Uſe ariſes. Gil. Law of Uſes 115.

94. Likewiſe if a Man, in Conſideration of Marriage of his Son's Daughter, covenants that his Land ſhall deſcend, come and remain to him, or her, this is only a Covenant Executory, upon which an Action lies, and the Force of the Covenant is not to alter the Deſcent; bus it is no Covenant to ſtand ſeized, whereby he may be intitled in Chancery to a ſpecifick Performance. Moor 122. pl. 267. Cro. Eliz. 279. Blitheman *v.* Blitheman. Gil. Law of Uſes 115.

Here the Seizin of the Father is not appropriated to the ſeveral Uſes, but only a Remainder limited after the Father's Death, which cannot be without a particular Eſtate, nor that without a particular Contract, and no Man can contract with himſelf. Gil. Law of Uſes 60.

95. Alſo if a Man ſeized of a *Reverſion Expectant*, upon an Eſtate for Life, gives, grants and confirms the ſame to his Son in Fee, in Conſideration of natural Love and Affection expreſſed in the Deed, to the Uſe of himſelf for Life, the Remainder to his Son in Tail, the Remainder to a Daughter, without Attornment or Enrolment, this Conveyance is void, and cannot enure by way of Covenant to ſtand ſeized; for if it enures by way of Covenant to ſtand ſeized, the legal Eſtate out of which the Uſes riſe remain in the Covenantor: But the Intent of the Conveyance is to raiſe the Uſes by way of Tranſmutation of Poſſeſſion, and to transfer the Freehold, out of which the Uſes are to riſe to the Son; but this Conveyance will not paſs that Freehold for want of Attornment, and ſo the Uſes can never ariſe by this Deed. 2 Vent. 318. Samon *v.* Jones. Sid. 25. Hore *v.* Dix. Gil. Law of Uſes 115.

96. So

Dy. 55. Ld. Burgh's Caſe. 96. So where *A.* ſeized of Land in Poſſeſſion and in Uſe, covenanted on the Marriage of his Son with the Daughter of *J. S.* that the Son, immediately after his Deceaſe, ſhall have in Poſſeſſion or in Uſe all his Lands; according to the ſame Courſe of Inheritance as they then ſtood in; and that all Perſons now ſeized, or hereafter to be ſeized, ſhall be ſeized to the ſame Uſe and Intent. It was held that the Fee-Simple of the Uſe was not out of the Father, nor is it changed, and that, as it is, it is only a Covenant; but perhaps it might be otherwiſe, had the Words been, that immediately after his Deceaſe the Land ſhould enure and remain to the Son.

And. 25. pl. 55. 97. So where the Father, in Conſideration of marrying of his Son, covenants, *&c.* that he, *&c.* has not made, nor ſhall make any Grant, *&c.* of the ſaid Lands, but that all the ſaid Lands, *&c.* ſhall deſcend, remain and come in Poſſeſſion and Uſe to the ſaid Son, and the Heirs Male of his Body, *&c.* no Uſe is created or altered by thoſe Words.

Sid. 27. pl. 7. in Caſe of Hoare *v.* Dix. 98. *Bridgman* Ch. J. took a Difference between Covenants obligatory and Covenants declaratory, for Covenants declaratory ſerve to limit and direct Uſes, but Covenants obligatory (as for Enjoyment free of Incumbrances) ſhall never be conſtrued to raiſe an Uſe, inaſmuch as they have another Effect.

4. The Effect of a Covenant to ſtand ſeized.

99. It is a Rule that no Covenant to ſtand ſeized can paſs an Uſe unleſs the Covenantor has Seizin of the Eſtate at the Time of the Contract. Thus,

2 Roll. Abr. 790. 100. If a Man covenants to ſtand ſeized of the Manor of *D.* which he ſhall hereafter purchaſe, to the Uſe of *J. S.* and he afterwards purchaſes the Manor, yet this is void.

Noy 19. Yelverton *v.* Yelverton. Cro. Eliz. 401. S. C. 101. So if a Man covenants to ſtand ſeized of the Land that he ſhall hereafter purchaſe to the Uſe of his Son, and after purchaſes Land to the Uſe of himſelf and his Heirs, the Fee is in the Father.

Gil. Law of Uſes 116. 102. For if a Man binds any Lands, you muſt ſuppoſe him to have a Power to oblige them; but he that hath no Intereſt, hath no Power to oblige them; and therefore ſuch a Covenant in Equity, before the Statute, could not oblige him to a ſpecifick Performance, for that were in Equity, to bind the Land, which is abſurd; and ſince the Covenant is void in Equity, there can be no Execution by the Statute; for the Rules of Law are equally ſtrict in avoiding this Repugnancy; for in Law, every Diſpoſal ſuppoſes a precedent Property; and by Conſequence, every Covenant to ſtand ſeized preſuppoſes a precedent Seizin.

Cro. Eliz. 401. Noy 19. 103. Another Reaſon why the Uſe declared upon the Covenant is bad, is this; becauſe the Uſe muſt be limited by the Donor or Feoffor; for he muſt limit the Uſe, that at the Time of Limitation had the Diſpoſal: Now in this Caſe the Donor limits the Fee to the Purchaſer, which controuls the Intent of the Covenant.

Cro. Eliz. 402. Yelverton *v.* Yelverton. Noy 1. S. C. 104. By the ſame Rule it is ſaid, that if the Mortgagor, in Conſideration of ſo much Money paid by *J. S.* covenants, that after Redemption he will ſtand ſeized to the Uſe of *J. S.* and his Heirs, * this is a void Covenant; but if a Feoffment be made to *A.* to enfeoff *B.* to the Uſe of *C.* and *A.* enfeoffs *B.* without the Limitation of any Uſe; yet it ſhall be to the Uſe of *C.*

* The Reaſon is, for that at the Time of the Contract he had no Eſtate or Intereſt.

Cro. Eliz. 401. Noy 19. But it is ſaid in Noy, that if another Uſe had been expreſſed in the Fine, that ſhould have controuled the firſt Declaration of the Uſe. 105. So if a Man covenants to purchaſe Land by *Michaelmas* next, and before *Eaſter* following, to levy a Fine to ſuch Uſes, and accordingly purchaſes Land, and levies a Fine, without expreſſing any Uſe, or without a Conſideration, notwithſtanding the Law ſays it ſhall be to the Uſe of the Conuſor, yet it may be averred to be to the Uſes limited in the firſt Covenant.

106. For

106. For a Man may declare the Intent of a future Act, which he had no Power to do at the Time of the Declaration; for to declare the Intent of a future Act, doth not suppose an immediate Power of doing it; but the doing any Act itself, which the Law allows to be good and effectual, presupposes the Power of doing. Gil. Law of Uses 117.

107. If a Man, seized of three Acres, makes a Lease of one to *A.* for Life, and of another to *B.* for Life, and of another to *C.* in Tail, and then reciting the several Estates, covenants, after all the Estates finished, to stand seized to the Use of his Brother in Fee; if *A.* dies, the Brother shall have the Reversion of that Acre immediately, and not expect till the other Estates, that is, the other Estate for Life and the Estate Tail, are determined; for it must be construed *secundum subjectam materiam*; and the Covenantor hath three distinct Reversions in him. 5 Rep. 8. b. Justice Windham's Case. Gil. Law of Uses 114.

108. It is a Rule likewise, that a Fee cannot be raised by way of Purchase to a Man's right Heirs, for wherever the Heir takes by Purchase, the Ancestor must depart with his whole Fee. Thus *A.* seized in Fee had Issue two Sons *B.* and *C. A.* covenanted to stand seized to the Use of *B.* and the Heirs Male of his Body on *M.* his Wife to be begotten; and for want of such Issue, to the Heirs Male of the Covenantor; and for want of such Issue, to his own right Heirs for ever. *B.* had Issue of *M.* a Son and a Daughter; *A.* dies, and then the Son dies; the Daughter shall not take as Heir general, but the Uncle, *viz. C.* shall take *Per formam Doni*, and not by Purchase but by Descent. 2 Mod. 207, 211. Southcot *v.* Stowel.

109. It is to be observed likewise; that Uses may arise on Covenants to stand seized by Implication; as

110. If a Man covenants to stand seized to the Use of the Heirs Male of his Body, omitting himself; *per* three Justices, but *Twisden* J. *contra*, it is good, and he himself takes by Implication; and so Judgment was given for the Defendant. Vent. 372. Pibus *v.* Mitford.

111. But where *A.* made a Feoffment to the Use of himself for Life, and after his Death, and the Death of *M.* his Wife, to *B.* his Son in Tail: It was held in this Case, that no implied Use did arise to *M.* and therefore the Estate to *B.* was contingent. Pollex. 94. Carpenter *v.* Smith.

112. It has been held likewise that a Covenant to stand seized to the Uses in the Indenture, and to no other, cannot exclude Uses by Implication, but only express Uses. 2 Lev. 76. Arg. in Case of Pibus *v.* Mitford.

2. Of the Nature and Operation of a Bargain and Sale to Uses.

113. The Nature and Effect of this Kind of Assurance has been already explained;* and having thus treated of the several Sorts of Conveyances to Uses, we proceed to shew, * See Title *Bargain* and *Sale*. Vol. 1. p. 227.

(F) What Kind of Property may be conveyed by way of Uſe.

Sir Wm. Jo. 127. by Dodridge J. in Parl. in Ld. Willoughby's Caſe.

1. ALL Lands and Inheritances local, as Rents *in Eſſe*, Advowſons in Groſs, Common for ſo many Beaſts, Liberties, Franchiſes viſible or local, may be conveyed by way of Uſe.

Id. Ibid.

2. But Inheritances perſonal, which have no Relation to Lands or local Hereditaments, cannot be conveyed by way of Uſe, as *Annuities*.

PerCrew, Ch. J. Sir W. Jo. 117. in Ld. Willoughby's Caſe.

3. A Seignory however conſiſting of Homage and Fealty, the Service being merely perſonal, and to be performed by the Perſon of a Man, and reſting in Feaſance, may be granted to an Uſe in reſpect of the Poſſibility that the Tenancy may eſcheat, which perhaps never will be.

Per Crew, Ch. J. Jo. 117. in Ld. Willoughby's Caſe.

4. So a Stewardſhip or Bailiwick in Fee Simple of a Manor may be granted to an Uſe, being perſonal Offices in Point of Service.

Per Crew, Ch J. Jo. 118 in Ld. Willoughby's Caſe, cities it as ruled, 42 Eliz. B. R. in the Counteſs of Warwick's Caſe.

5. So a Liberty of *Retorna Brevium* which is perſonal, conſiſting in Execution of Proceſs.

Id. ibid.

6. So of a Shrievalty of a County. And,

Id. ibid. And it is there farther ſaid that there is a Diverſity between a mere and a naked Truſt, wherein he that hath it, hath neither *Jus in Re*, nor *Jus ad Rem*, nor Remedy by the Common Law, but only a mere Preception of the Profits by the Permiſſion of the Terretenant; and an Eſtate of Inheritance, wherein the Owner hath both *Jus in Re*, and *Jus ad Rem*, by the Rule of the Common Law, and for the Profit whereof the Law giveth the Owner Remedy by Writ of Aſſize, and a *Præcipe quod reddat*, as the Caſe requireth; and the Confidence required in the Perſon for the executing the Office may be an Objection (though a weak one) that it cannot be transferred over, but not that an Uſe, that is, a Pernancy of the Profits, cannot be raiſed out of the Eſtate, the Truſt in the Perſon is no Objection at all; for the Uſe reſpecteth the Eſtate of Inheritance, and not the Perſon.

7. Where it is ſaid, that a Truſt cannot be raiſed out of a Truſt, and therefore a Bargain and Sale by Deed indented and inrolled cannot be limited to an Uſe, becauſe an Uſe cannot be limited to an Uſe, yet notwithſtanding, when a Man is ſeized of an Eſtate of Inheritance of an Office holden by grand Serjeanty, wherein there is required Truſt in the Perſon, yet an Uſe which is a Pernancy of the Profits belonging to that Office, may be raiſed out of the Eſtate of Inheritance, otherwiſe no Land holden by grand Serjeanty could be transferred to an Uſe, nor any Uſe raiſed out of the ſame.

Gil. Law of Uſes, &c. 281.

8. Nothing that paſſes by way of Extinguiſhment, can be granted to an Uſe.

Arg. Le. 148. pl. 205. in Caſe of Read *v.* Naſh.

9. Neither can an Uſe be raiſed out of a Power.

Sir Wm. Jo. 127. Gil. Law of Uſes 281.

10. Neither can Things which are mere Rights be conveyed by way of Uſe, as *Commons, &c. Ways in Groſs*, for a Man cannot walk over Ground to the Uſe of a third Perſon.

11. In

11. In Case the Plaintiff declared that the Defendant seized in Fee of the Lands over which there was a Way, and of other Lands by Indenture of Bargain and Sale inrolled, conveyed his Lands to *J. S.* in Fee, with a Way over his Lands, and that *J. S.* leased the Premisses to the Plaintiff, and that the Defendant disturbed him. The Court were all of Opinion, that by this Bargain and Sale the Land only passed, and not a Way over the same, because nothing but the Use passed by the Deed, and there cannot be the Use of a Thing which is not in *Esse*, as a Way, Common, *&c.* newly created, and until they are created no Use can be raised by Bargain and Sale, and consequently nothing passed by the Indenture. Cro. J. 189. pl. 13. Bewdly *v.* Brookby.

12. An Use may be of a Lease or Chattel. And. 294.

13. But it is said that the Property of Money cannot be changed by a gratuitous Delivery to an Use. Thus Inglefield's Case.

14. A Sum of Money was delivered to *J. S.* to the Use and Behoof of a Woman, to be delivered to her at the Day of her Marriage, and before the Marriage the Bailor revoked it; two Justices held the Money countermandable, and two *è contra*. But *Dyer* says, it seems that the Property of the Money cannot be changed by the Words to the Use and Behoof. Dy. 49. a. b. pl. 7. &c. Lyte *v.* Penny. But if the Money had been delivered by way of Consideration, Satisfaction or Recompence, there the Property would alter, and the Bailor could not countermand it. Dyer. *loc citat'*.

15. One seized in Fee may bargain and sell, grant and demise Land to others and their Heirs to the Use of one for Years, because he has a Fee-Simple. But Lessee for Years cannot grant and sell his Lease to the Use of one for Years. Brownl. 40.

16. We have thus shewn how Uses may be raised according to the Nature of the respective Assurances, and what Kind of Property may be conveyed by way of Use: It remains now therefore more particularly to enquire,

1. What Kinds of Uses are executed by the Statute. 2. What Cases are out of the Statute.

(G) Of the several Kinds of Uses executed by the Statute, * which in their more general Division, are twofold, viz.

1. Uses in *Esse*. 2. Uses in Possibility.

* Concerning the Execution of *Jointures* by the latter Clauses of the 27 H. 8. c. 10. See Title *Jointure*, V. 3. p. 220.

1. Uses in *Esse*.

1. WITH Regard to Uses in *Esse*, they are raised either by Transmutation of Possession, or without such Transmutation; and the Manner in which they are executed, has been already explained in treating of the several Sorts of Conveyances to Uses, and their respective Operations. It remains therefore to consider of—

2. Uses

2. Uſes in Poſſibility; wherein

1. Executory Fees. 2. Contingent Remainders.

1. Of Executory Fees.

See *ante* Letter D. p. 357. In what Caſe the Statute operates againſt the Rules of Law.

2. Though a Remainder of a Fee cannot by the Rule of Law be limited after a Fee-Simple, yet that Rule hath of late been evaded by diſtinguiſhing between an abſolute Fee-Simple and a Fee-Simple which depends on a Contingency; and how ſuch Executory Fees may be limited, is here to be conſidered, and they are to be governed by the following Rules:

Gil. Law of Uſes 118.

1ſt, That all Limitations that tend to the Proviſion of the Family, and to ſecure againſt Contingencies which are within the Parties own immediate Proſpect, are to be favoured.

2dly, All Limitations that perpetuate, or tend to Perpetuity, are in themſelves void and repugnant to the Policy of the Law.

3. And therefore it is to be ſeen what is a Perpetuity.

Id. Ibid. Caſ. of Perpet. 31. 1 Rep. 138.

4. A Perpetuity is the Settlement of an Intereſt deſcendible from Heir to Heir, ſo that it ſhall not be in the Power of him in whom it is veſted to diſpoſe of it, or turn it out of the Channel.

Id. Ibid.

5. The Inconveniencies of which are, that the Eſtate is made uncapable of anſwering the Ends for which Perpetuity is maintained and eſtabliſhed; for it puts it out of the Power of the Owner to provide for the Neceſſities of his Family, or the Extremity and various Changes of his own Affairs out of the Eſtate; beſides it would be of univerſal Damage to the Commonwealth; for it would ſhut up all Converſe, by making the Way of Communication between Land and Money utterly impracticable; to know therefore how far a Limitation may be allowed, without the Danger of being conſtrued a Perpetuity, it is to be conſidered, what Limitations are conſiſtent with the Rules of Reaſon and Policy.

Gil. Law of Uſes 119.

1ſt, The Law in all Caſes allows the Limitations of Eſtates for Life, to Perſons in Being; for there can be no Danger in ſuch a common Limitation, nor any Deſign to perpetuate; and therefore here the Party is reſtrained from Alienation farther than for his own Life.

Id. Ibid. & 120.

2dly, The Law allows of no Eſtate of Inheritance, that goes in lineal Succeſſion, but what is under the Power of that Perſon to whoſe Repreſentatives the Eſtate muſt deſcend; and to eſtabliſh a Right of Succeſſion, and to reſtrain the Power of Alienation, is to perpetuate; and therefore to limit an Eſtate of Succeſſion, determinable upon remote Contingency, tends to a Perpetuity; ſince none can purchaſe with Security while ſuch a Cloud hangs over the Eſtate.

6. Before we proceed to the Application of theſe Principles, it is neceſſary to obſerve, that

7. As to executory Fees, there is a Difference, where they riſe by way of Uſe, and where by way of Deviſe.

Cro. Eliz. 765. Wood *v.* Reignold. Moor 731. Strangways *v.* Newton.

1ſt, If they riſe by way of Uſe, there muſt be a Seiſin in ſomebody to be executed in the Grantee of the contingent Uſe, whenſoever the Contingency happens; for if there be not a Perſon that can be ſeized of an Uſe, there can be no Uſe; and conſequently there can be no Execution of it; therefore if a Man covenants to ſtand ſeized to the Uſe of himſelf in Fee, till ſuch a Marriage takes Effect, and then to the Uſe of himſelf for Life, the Remainder to his Wife, his Son, &c. and before the Marriage he makes a Feoffment in Fee, Gift in Tail, or Leaſe for Life, upon good Conſi-

Conſideration, without Notice of the Uſes, the Eſtates limited after the Marriage ſhall never ariſe; becauſe there is nobody ſeized to ſuch Uſes, and the ſame Law is of Feoffments to ſuch contingent Uſes.

8. But if in this Caſe he had made a Leaſe for Years, he would not have deſtroyed the future Uſe, but only have bound it; becauſe there is a Seizin, out of which the Uſe ariſes; and at Common Law, if the Feoffees had made a Leaſe upon good Conſideration, as in this Caſe, it would have bound the Lands, and conſequently *Ceſtui que Uſe* muſt have the Profits of the Land thus leaſed; and in this Caſe, ſince the Statute, the Covenantor has the ſame Power of obliging the Fee; and therefore thoſe to whom the contingent Eſtates are limited muſt take it under the Charge. Cro. Jac. 168. Bould *v.* Winſton.

9. So in Caſe of Feoffment to the Uſe of *A.* in Fee, and if *B.* pays ſo much, *&c.* then to *B.* in Fee; if *A.* deviſes his Land, and dies, it deſtroys the contingent Eſtate; otherwiſe it is, if he had deviſed Portions out of the Land, for that would not alter the Freehold. Moor 733. Strangway *v.* Newton. Gil. Law of Uſes 126.

10. A Recovery doth not bar an executory Fee; for the Recoveror with Notice, and without Conſideration, is ſeized to the former Uſes. Cro Jac. 592. 3 Pells *v.* Brown

2dly, With Regard to executory Deviſes.

11. They have been already treated of under Title *Deviſe*; * yet it may not be improper to take Notice of ſome Circumſtances more particularly applicable to the Title under Conſideration. * See Title *Deviſes*, Letters I and K.

12. If a Man deviſes Lands to *A.* in Fee, and upon Contingency to *B.* in Fee, and *A* makes a Feoffment in Fee, this doth not deſtroy the Contingency; for by a Deviſe the Freehold itſelf is transferred, and there needs no Perſon to be ſeized to execute an Eſtate in the Deviſee, as muſt be where a Feoffment is made to executory Uſes. Gil. Law of Uſes 127.

13. But if a Man deviſe to *A.* for Life, with a contingent Remainder, if *A.* makes a Feoffment in Fee, this deſtroys the contingent Remainder, becauſe there is no particular Eſtate to ſupport it. Id. Ibid.

With Regard to executory Deviſes of a Fee-Simple in Contingency, after an abſolute Fee, they ſtand upon the Reaſon of the old Law, which admits favourable Diſtinctions to ſupply the Intent of the Teſtator, that being always to be obſerved in Wills; and where there is ſuch an executory Deviſe, there needs not any particular Eſtate to ſupport it, becauſe the Teſtator did not part with his whole Eſtate in the firſt Limitation, for ſomething ſtill remained in him to give, which accordingly he gave to another, but upon a Contingency which might happen upon the firſt Limitation; therefore, becauſe the Perſon who is to take upon him ſuch a Contingency, hath not a preſent, but a future Intereſt, his Eſtate cannot be barred by a common Recovery; and that which remained in the Teſtator to give, after the firſt Fee thus limited upon a Contingency, ſhall deſcend after his Death to his Heir, till the Contingency happens. 2 Nelſ. Abr. 797.

14. It remains now to apply the Principles above laid down.

1. With Regard to Freeholds.

15. The firſt Remainder which was allowed to be good by a Deviſe, after a conditional Fee-Simple limited before in the ſame Will, was *Anno* 20 *Eliz.* where the Deviſe was to the Son and his Heirs, and if he die before twenty-four, and without Heirs of his Body, Remainder over: Now this was a plain Remainder limited after a Fee-Simple to the Son, but not upon his dying without Heirs of his Body generally, for that had been too remote an Expectancy, but it was upon his dying without Heirs of his Body, before he was twenty-four Years old; ſo that it being a Remainder to ariſe upon a Contingency, which might happen in a few Years, it was adjudged good, but the Son living many Years after he was twenty-four Years old, this Contingency never happened; and therefore it was adjudged he had an Eſtate in Fee, and not in Tail. 3 Leon. 64. Hind *v.* Lyons. Dyer 124. pl. 38.

Dyer 330. pl. 20. 2 Nelſ. Abr. 797.

16. But there can be no executory Deviſe of a Fee-Simple, after an Eſtate-Tail; becauſe that would tend to a Perpetuity, therefore the firſt Limitation muſt always be in Fee; as for Inſtance, the Father having two Daughters, deviſed a Houſe to the eldeſt and her Heirs, and another Houſe to the youngeſt and her Heirs, and if the youngeſt died before ſhe was ſixteen, living the eldeſt, then the Houſe to the eldeſt and her Heirs; and if both his Daughters died without Iſſue, then both the Houſes to his Grandaughters and their Heirs; adjudged, that this laſt Clauſe, *viz.* If both his Daughters died without Iſſue, did not make croſs Remainders to them in Tail by Implication; but that each of them had a Fee-Simple conditionally, immediately, *viz.* the eldeſt if ſhe ſurvived, her Siſter dying before ſhe was ſixteen, and the youngeſt if ſhe outlived that Age; that the Eſtate-Tail was not veſted in the eldeſt but upon a Contingency, *viz.* If the youngeſt Daughter had died before ſhe was ſixteen, which Contingency never happened, becauſe the youngeſt Daughter outlived that Age, and then this Caſe was no more than a Deviſe of a Houſe to the youngeſt Daughter and her Heirs, and if ſhe die before ſhe was ſixteen, living the eldeſt, then to her and her Heirs; which is a Remainder in Fee limited, after a conditional Fee; and good by way of executory Deviſe.

Godb. 282. Pells *v.* Brown. Cro. J. 590. S. C.

17. Nevertheleſs we meet with ſome contrary Reſolutions as to this Point, till at Length the Law ſeems to have been ſettled by the following Caſe, *viz.* The Father deviſed his Lands to his youngeſt Son and his Heirs, and if he died without Iſſue, living the eldeſt, then to him and his Heirs; afterwards the youngeſt Son imagining he had an Eſtate-Tail, by theſe Words, *if he died without* Iſſue, ſuffered a common Recovery, and ſold the Lands, and died without Iſſue, his eldeſt Brother being ſtill living; and the Queſtion was, whether he had a good Title or not, againſt the Purchaſer; and adjudged for him, that he had a good Title, becauſe the youngeſt Son had neither an Eſtate-Tail, nor an abſolute Fee-Simple, but a conditional Fee; for the Deviſe to him and his Heirs, and if he die without Iſſue, is not abſolute, and indefinite, but it is tied up to a Contingency of his dying whilſt his eldeſt Brother was living; now he being living when the youngeſt Brother died, the Fee-Simple determined by his Death without Iſſue, and immediately aroſe in the eldeſt Brother, who had the Remainder in Fee, depending upon the Poſſibility that he might be alive when his youngeſt Brother died without Iſſue, which Remainder did not depend upon any particular Limitation, but upon a collateral Determination of the Eſtate of the youngeſt Son dying without Iſſue whilſt he was living; and becauſe it was a Remainder not in Being when the Recovery was ſuffered, nor until the ſaid Contingency did happen, therefore it could not be barred by that Recovery.

But if an Eſtate be limited to *J. S.* in Fee, while *J. N.* hath Iſſue, Remainder to *J. D.* this is void to *J. D.* for this comes within the Danger of a Perpetuity, and doth not determine within the common Compaſs of an Eſtate for Life.

Vaugh. 272. Gardner *v.* Sheldon.

Nelſ. Abr. 798.

18. So where there was a Deviſe to *T. P.* and his Heirs, and if he die without Iſſue, living *W. C.* or if he die before he is of the Age of twenty-one Years, Remainder over to another in Fee; it was adjudged, that this was a conditional Fee in *T. P.* immediately, and that the Words if he die without Iſſue, make an Eſtate-Tail, if he had gone no farther; but it is dying without Iſſue, living *W. C.* ſo that though it was an Eſtate-Tail, it was not to veſt in *T. P.* but upon that Contingency; ſo that there is a plain Difference, where the Limitation is upon a dying without Iſſue generally, and a dying without Iſſue in the Life-time of another; for in the firſt Caſe there can be no executory Deviſe after an Eſtate-Tail, becauſe that would tend to a Perpetuity, for that Contingency is too remote, where a Man muſt expect a Fee upon another's dying without Iſſue generally; but dying without Iſſue, living another, may happen in a little Time, becauſe it depends but upon one Life, and therefore a Deviſe of Fee-Simple to one, but to remain to another upon ſuch a Contingency, is now held good, by way of executory Deviſe, but not upon a dying without

out Iſſue generally; as for Inſtance, The Father deviſed Lands to his eldeſt Son and his Heirs, and other Lands to his youngeſt Son and his Heirs, and that if either of them died without Iſſue, the Survivor ſhould be Heir to the other; adjudged, this was an Eſtate Tail in them, becauſe it is limited to them upon their dying without Iſſue generally. Cro. Ja 695. Chadock v. Cowley.

2. With Reſpect to Chattels.

19. Not long after a Fee-Simple was adjudged to ariſe to one, after a contingent Fee limited to another, it became a Queſtion, whether a Term for Years might be limited in the ſame Manner; and it was objected that it could not, becauſe it being no more than a Chattel, it was ſo poor and mean an Intereſt, that it could not be limited over in Remainder; for by the Rules of Law, the Deviſe of a Chattel for an Hour, is a Deviſe of it for ever. Now in Anſwer to the Poverty and Meanneſs of a Chattel Intereſt, it is certain, there is no material Difference between it and an Inheritance, in reſpect to the Owner of the Lands himſelf, but only in reſpect of the Duration of his Eſtate; for the Proprietor of a Leaſe for Years hath as abſolute a Power over it, as the Owner of an Inheritance hath over that Eſtate, and ſince great Part of the Lands in this Nation is held under Leaſes, it ſeems very abſurd, for any one to affirm that ſuch Leſſees cannot provide for the Contingencies of their Families, becauſe their Eſtates and Intereſts in ſuch Lands are accounted poor and mean in Law, being compared to thoſe, who held in Fee-Simple abſolutely. 2 Nelſ. Abr. 801. Ld Not. Arg. Caſ. of Perp. 32, & 33.

20. It is true, this Reaſon hath prevailed, for formerly, wherever there was a Deviſe of a Term of Years to one, and that if he die, living another Perſon, (particularly named in the Will), that it ſhould remain to the other Perſon, during the Reſidue of the Term, ſuch a Remainder was held void. Dy. 74. pl. 18.

21. But about the Beginning of the Reign of Queen *Eliz* the Judges were of another Opinion, for there being a Deviſe of a Term for Years to one, for ſo long a Time as he ſhould live, Remainder over to another; this was adjudged good; at length it was adjudged, that a Remainder of a Term to one, after it was limited to another for Life, was good, *viz.* The Teſtator being poſſeſſed of a Term for ſixty Years, deviſed that his Wife ſhould have all his Lands in Leaſe, for ſo many Years as ſhe ſhould live, and that after her Death, the Reſidue thereof ſhould be to his Son, and his Aſſigns, and made her ſole Executrix, and died; this Remainder was adjudged good upon this Diſtinction, *viz* that there was *Jus Poſſeſſionis* and *Jus Proprietatis* of a Term for Years, that it might be collected out of the Words of this Will, that the Teſtator did not intend the abſolute Property of it to his Wife, but only the Poſſeſſion for ſo many Years as he ſhould live, though it is true, there was a Poſſibility ſhe might ſurvive the whole Term, but that it is plain he intended the Right and Property of the Reſidue of the Term to his Son; and this my Lord *Nottingham* tells us, in the Duke of *Norfolk's* Caſe, was the firſt Time that an executory Remainder of a Term for Years was adjudged good. Dy. 277. pl. 59. Dy. 358. pl. 50. 4 Leon. 192. Ld Not. Arg. Caſ. of Perp. 33.

22. Afterwards ſome Diſtinctions were made, where the Deviſe was of the Occupation and Profits of the Land, *&c.* in Leaſe, and where the Deviſe was of the Leaſe or Term itſelf; but theſe Diſtinctions were ſet aſide in the following Caſe. Where a Leſſee for Years of a Farm deviſed the Uſe and Occupation thereof to his Wife for Life, and after her Deceaſe to his Son *Matthew Manning*, for the Reſidue of the Term, and made her ſole Executrix, and died; it is true, one Judge was of Opinion, that 8 Rep. 94. Matthew Manning's Caſe. But a Grant of the Leaſe for Years to *J. S.* for Life, Remainder

to *J. N.* is not good to *J. N.* for Leaſes for Years being under the Power of the Freeholder, they are recovered as Chattels, and go to the Executors; and a Chattel cannot be limited for Life with a Remainder over; becauſe this would create great Inſecurity in common Traffick. Gil. Law of Uſes 121.

the Reſidue of the Term thus deviſed to the Son was void, becauſe his Mother had the whole by the Deviſe to her for Life, and there being only a Poſſibility that ſhe might die before the Term expired, the Reſidue could not be deviſed over to another, to veſt in him upon ſuch a Poſſibility; but adjudged, that *Matthew Manning* the Son did not take this Term by way of Remainder, but by way of an executory Deviſe to him, *viz.* upon the Contingency of his Mother's Death within the Term; and that there was no Difference where the Deviſe is of the Leaſe itſelf, or of the Land, or Farm in Leaſe, or of the Uſe, Occupation, or Profits of the Land, for the Law will make ſuch Conſtruction of thoſe Words, as may conſiſt with the Intent of the Teſtator.

1 Vol. Caſ. in Eq Abr. 191. *If there are ever ſo many Lives, there muſt be a Survivor, ſo that in Effect it is but the Length of one Life.

23. The Law ſeems to be now ſettled, that executory Deviſes are good, provided the Contingency is to happen within a Life, or ſeveral Lives,* ſo that they are all in Being, for there can be no Tendency to a Perpetuity, which was one great Miſchief apprehended from thoſe Kinds of Limitations. 2 Vol. Caſ. in Eq. Abr. 337.

Gil. Law of Uſes 124. 1 Vern. 235. Maſſenburg *v.* Aſh.

24. As the legal Eſtate of a Term may be deviſed, ſo the Truſt of a Term may be limited: The Truſt of a Term in Equity being governed by the ſame Rules that the Deviſe of a Term is at Law.

Id. ibid. Chan. Caſ. 8. Goring *v.* Bickerſtaff.

25. A Limitation of a Term for Years to twenty diſtinct Perſons in *Eſſe* is good, as has been ſaid; but the Limitation of a Term to *A.* for Life, the Remainder to the right Heirs of *B.* a Perſon in *Eſſe*, is a void Remainder; and after the Death of *A.* it ſhall revert to the Donor; becauſe this might tend to the eſtabliſhing an Eſtate of Inheritance in a Chattel, and putting it out of the Courſe the Law had ſettled for it, whereby it ought to go to the perſonal Repreſentative.

Id. ibid.

26. So if a Term be limited to *A.* for Life, the Remainder is in the Donor; and if a Term be limited to *A.* for Life, the Remainder to the right Heirs of the Donor, this is a void Limitation, becauſe the Reverſion is in him.

Id. ibid. 4 Rep. 66. Fulwood's Caſe.

27. But if the Truſt of a Term be limited to *A.* for Life, the Remainder to *B. B.* may diſpoſe of the Remainder; yet if a Term be deviſed to *A.* for Life, the Remainder to *B. B.* cannot diſpoſe of this Remainder; for by the Rules of Common Law, a Poſſibility cannot be granted over, for a Man that only may have a Right, has at preſent no Right in him; and while the Rules of Law ſay he has no Right, it is contradictory and repugnant, to allow him to act as a Perſon having Right, by transferring an Intereſt to another. *B.* in this Caſe, has only a Poſſibility to have a Right, becauſe the Eſtate of *A.* being of uncertain Duration may outlaſt the Term for Years; but in Chancery, where the Truſt is examined, they allow a Man to provide for his preſent Occaſions out of what he may poſſibly have; and a Purchaſer of it ſhall not loſe the probable Advantage, ſince he hath given for it a valuable Conſideration.

2. Of contingent Remainders.

* See Title *Remainder*, Letter D. & *ſequent.*

28. The Law reſpecting this Title has, in Part, been already explained,* it may be neceſſary however more particularly to conſider,

1. In

1. In what Manner they are to be executed.

29. If a Feoffment be made to *J. S.* in Fee, to the Uſe of *A.* for Life, Remainder to his firſt, ſecond and third Son, the Remainder to *B.* in Fee, from theſe Limitations the three following Obſervations may be drawn: Gil. Law of Uſes 127.

1ſt. That there ought to be a Perſon ſeized to the Uſe at the Time when the Uſe is executed; and this is plain by the Words of the Statute, *viz. If any Perſon ſtand or be ſeized.* 1 Rep. 126. a. Chudleigh's Caſe.

2dly. That the Eſtate for Life is immediately executed in *A.* with the Remainder in Fee to *B.* by the Statute; becauſe the Uſe is immediately in them, and they have the Poſſeſſion in the ſame Manner they have the Uſe. Pop. 74.

3dly. That no Poſſeſſion can be immediately executed in the Sons, becauſe they are not in Being; and therefore capable of no Property, neither in Uſe nor Poſſeſſion. 1 Rep. 126. a. Pop. 72. 1 Rep. 136. a.

30. The Inattention to theſe Particulars, cauſed two falſe Opinions in this Matter in the Debate of *Chudley's* Caſe.

1ſt. Some thought, according to the ſecond Rule, that the whole Poſſeſſion muſt be executed in *A.* and *B.* and therefore the contingent Uſe, when it falls, was executed out of the firſt Livery; and the Eſtate formerly in the Feoffees; and this by the Words of the Statute, declaring that the Eſtate that was in the Feoffee, ſhall be in *Ceſtui que Uſe*; and hence they inferred, that ſince the Eſtate was executed by the Power of the Statute, it muſt be preſerved till ſuch Execution by the ſame Power; and therefore they ſaid, the contingent Remainders were in *Abeyance*, and not extinguiſhable by the Alienation of Tenant for Life. Pop. 73. 1 Rep. 132, 133, 134.

31. But this is a Miſtake; firſt, becauſe this is contrary to the firſt Rule; for that ſuppoſes an Eſtate in *J. S.* at the Time of the Execution. 1 Rep. 136. a. 1 And. 332.

2dly. Becauſe it is contrary to the Nature of an Abeyance by the Rules of Law; for if there be Tenant for Life, Remainder to the right Heirs of *J. S.* living, if Tenant for Life dies, or aliens, during the Life of *J. S.* the Remainder is deſtroyed. 1 Rep. 135.

3dly. Becauſe it would create a Perpetuity. Gil. Law of Uſes 129.

32. Some add another Conſequence of this Doctrine, that an Uſe would riſe out of an Uſe. Id. ibid.

33. Others held a different Opinion; and they thought there was an immediate Remainder veſted in *J. S.* to ſerve the contingent Uſe when it falls, and that this Eſtate was determinable upon the Riſing and Execution of the Eſtate in the Sons, *&c.* Id. ibid. 1 Rep. 128, 9.

34. But this could not be, firſt; becauſe this is contrary to the ſecond Rule; for thereby an Eſtate is immediately veſted in *A.* and *B.* but by this Opinion, the Eſtate in *B.* is only Executory; for it ariſes to him upon the ſame Contingency that the Eſtate of *J. S.* riſes, for he could not have a Fee before; for then there would be a double Fee. Id. ibid.

2dly, Becauſe *J. S.* would have a Remainder without any Grantor, and the Law leaves it to Parties to limit their own Eſtates; and where Nobody has limited an Eſtate, there can be no legal Limitation. Id. ibid.

3dly, If a Remainder be veſted in *J. S.* he muſt puniſh Waſte, and enter for a Forfeiture; but the Party deſigned him no ſuch Benefit, but made him only an Inſtrument to convey it to others. Id. ibid.

35. The true Opinion is, that the legal Eſtate is executed in *A.* and *B.* but the contingent Remainders are not utterly loſt, becauſe the Poſſeſſion by the Statute muſt be executed in the ſame Manner as the Uſe is limited; therefore there remains a Poſſibility of Poſſeſſion by the Feoffees, to this Purpoſe only, that when the Contingency happens, then the Poſſeſſion may be transferred to the Remainder Man; and if this is an Eſtate not known Gil. Law of Uſes 130, 1.

known before, and ſo has no Determination at Common Law, yet it is ſuch an one as muſt be raiſed by the Intent of the Statute, and all its Ends could not be anſwered without it; and therefore to ſuppoſe, as in the other Opinions, no Eſtate in the Feoffees, or to reduce it to the Standard and Rules of Common Law, is equally falſe and impracticable.

2. How they may be defeated.—

1. Where there is no Power of Revocation.

* See Title *Remainder*, Letter G.

36. How they may be defeated, where there is no Power of Revocation, has been already explained;* It may not be improper however to take Notice of the following Diſtinctions.

2 Roll. Abr. 793. Bould *v.* Wilſon. Noy 122. Gil. Law of Uſes, &c. 138. cites S. C. and ſays, that this will not prevent the raiſing of the contingent Remainder, nor bind it; for the Covenantor has no Power to demiſe any Thing but the Reverſion, and conſequently the Freehold remains unaltered to ſupport the contingent Remainder; but he adds that if the Covenantor in this Caſe had reſerved for himſelf a Power of making Leaſes, this Leaſe would have been good, and a Revocation of the former Uſes.

37. If a Man covenants for a good Conſideration to ſtand ſeized to the Uſe of his Son for Life, the Remainder to ſuch Feme as the Son afterwards ſhall take to Wife, for her Life, with Remainder over, and after the Covenantor makes Leaſe for Years of the Land, reſerving certain Rent, and after the Son takes a Wife and dies; this Leaſe for Years is a Revocation and Deſtruction of the contingent Uſe for ſo much of the Time as the Leaſe is to continue; for the Eſtate of the Land is diſturbed before the Contingent happened; but this is not any Revocation for more than the Leaſe, for the Feme ſhall have the Reverſion, and the Rent reſerved upon the Leaſe.

2 Roll. Abr. 796. This was upon a Conveyance made by Sir Edward Coke. 2 Sid. 64, 129, 157. Heyns *v.* Villars. Gil. Law of Uſes 136. cites S. C. and ſays, that this doth not deſtroy the contingent Remainder to the Son of *C.* for Life, who had a Right of Entry for the Forfeiture, and a particular Eſtate in Right, on which the contingent Remainder will depend.

38. If *A.* ſeized in Fee, in Conſideration of natural Love and Affection to his Wife and Children, covenants with *B.* to ſtand ſeized thereof to the Uſe of himſelf for Life, and after to the Uſe of his Wife for Life, and after to the Uſe of *C.* his Daughter for Life, and after to the firſt Son of the Body of *C.* begotten, and ſo after to the other Sons of *C.* in Tail, and after to his own right Heirs, and after *A.* by Indenture between him and *F.* reciting the ſaid Conveyance and Eſtates, grants his ſaid Reverſion in Fee without any Conſideration to *F.* and his Heirs, to the Uſe of *F.* and his Heirs: This Grant of the Reverſion in Fee to *F.* is not any Deſtruction of the contingent Uſe limited to the firſt Son of *C.* but that the Uſe of the firſt Son of *C.* born after this Grant, and in the Life of *A.* or *C.* ſhall ariſe well enough, becauſe by the Grant of *F.* of the Reverſion the firſt Uſes and Eſtates being recited in the Deed of Grant, and this being without any Conſideration, the Grantee ſhall ſtand ſeized to the firſt Uſes, inaſmuch as he has Conuſance of the firſt Uſes; and though he limits it to the Uſe of the Grantee and his Heirs, yet this does not alter the Truſt any more now than at the Common Law.

Gil. Law of Uſes 136.

39. But if in this Caſe, the Wife had entered after the Huſband's Death; this would not only have revived her Eſtate, but the Eſtate of *C.* and the contingent Remainder thereon, which had never been put out of Being; otherwiſe it is, as is ſaid, in *Sampſon Shelton's* Caſe, if the contingent Remainder had depended upon the Eſtate of *B.*

Ld. Bacon's Readings on the Statute of Uſes 348,

40. If a Feme Covert or an Infant be infeoffed to any Uſe precedent ſince the Statute, the Infant or Baron comes too late to diſcharge or root up the Feoffment; but if an Infant be infeoffed to the Uſe of himſelf and his

Heirs, and if *J. D.* pay ſuch a Sum of Money to the Uſe of *J. G.* and his Heirs, the Infant may diſagree and overthrow the contingent Uſe.

41. But it is otherwiſe if an Infant be infeoffed to the Uſe of himſelf for Life, the Remainder to the Uſe of *J. S.* and his Heirs, for he may diſagree to the Feoffment as to his own Eſtate, but not to deveſt the Remainder, but it ſhall remain to the Benefit of him in Remainder. Ld. Bacon's Readings on the Statute of Uſes 348.

2. Where there is an expreſs Power of Revocation.

42. A Feoffment or Fine, *&c.* with Power of Revocation is void at Common Law, as to all Power of Revocation; for the Words of enfeoffing or granting, *&c.* transfer the whole Right, Property and Power of Diſpoſal to the Feoffee, *&c.* and therefore for the Party to limit to himſelf a Power of Revocation and Diſpoſal, is repugnant to the Force of the precedent Words, and would introduce a double Power ſeated in diſtinct Perſons over the ſame Thing, which the Common Law diſallows; but this Rule of Law was ſet aſide by the ſame Conſtruction that hath brought in executory Fees; for when before the Statute, Uſes were limited with Power to revoke, as the Occaſion, Circumſtances and Mind of the Party altered it, it was thought reaſonable that the Parties ſhould have Liberty to revoke according to their own apparent Intent, by which Uſes are ever governed; and ſince the Poſſeſſion is executed by the Statute as the Party had the Uſe, the Eſtate continues revocable. 1 Inſt. 237. Gil Law of Uſes 141.

A Power of *Revocation* is Two-fold; Hard. 415. per Hale: Edwards v. Slater.

1. A Power relating to the Land.
2. A Power ſimply *collateral* to the Land.

43. 1ſt. A Power relating to the Land, is where a Power is limited to one that had, hath, or ſhall have an Eſtate or Intereſt in the Land.

This is again Two-fold. Hard. 415. Gil. Law of Uſes 141.

1. *Appendant* or *annexed* to the Eſtate in the Land.
2. In *Groſs*.

44. 1ſt. Appendant or annexed to the Eſtate in the Land, is when a Man hath an Eſtate in the Land, and a Power of Revocation, and the Execution of the Power falls within the Compaſs of the Eſtate in the Lands; as if the Tenant for Life with Power to make Leaſes, or to revoke, grants a Rent-Charge, and then makes a Leaſe according to his Power, the Leſſee ſhall hold it charged during the Life of the Tenant for Life; for he hath Power to charge his own Intereſt, which, by his own Act cannot be avoided. Id. ibid.

45. And if in this Caſe, he covenants to ſtand ſeized to the Uſe of a Stranger, he cannot, by any After-Act, revoke the Uſes; for ſince, as is ſaid, the Execution of this Power falls within the Compaſs of the Eſtate, ſo that, unleſs it be executed during the Continuance of the Eſtate, it can never be executed; therefore whatever Act paſſes away the Eſtate, hinders the Execution of this Power of demiſing; for a Man cannot demiſe that Eſtate which he hath paſſed away to another.

46. 2dly. In Groſs, is where a Man hath an Eſtate and Power of Revocation, and the Execution of the Power falls out of the Compaſs of the Eſtate; as if there be a Tenant for Life, Remainder in Tail, with a Power lodged in Tenant for Life to make a Leaſe for 31 Years, to commence after Hard. 416. Gil Law of Uſes 141.

after his Death, to raiſe Portions to his Daughters; this is a Power in Groſs; and if Tenant for Life bargains and ſells the Lands in Fee, this doth not deſtroy the Power; for ſince the Execution of the Power doth not fall within the Compaſs of his own Eſtate, the ſelling of his own Eſtate only, doth not hinder the making uſe of the Power.

Hard. 416. 47. But if he had levied a Fine, or made a Feoffment in Fee, this Power had been deſtroyed, for here he abſolutely paſſes the entire Eſtate, and deveſts all the Remainders; and thus, by paſſing the whole Eſtate to another, and limiting new Uſes to his own Benefit, he hath deſtroyed all the Power of Revocation; for this Power cannot be executed but out of the Remainders; and he hath prevented the Execution of it by having already diſpoſed of the whole Eſtate to another.

Hardr. 416. And ſee 10 Rep. 48. Lampet's Caſe. 48. He may likewiſe releaſe ſuch a Power of Revocation to the Remainder-Man; for he that is to have an Intereſt by any Poſſibility may releaſe the ſame to the preſent Poſſeſſor, as well as if he had a future Right, for it is according to the Policy of the Law, for the quiet and Peace of the Poſſeſſors.

Gil. Law of Uſes 143. Hard. 415. 49. 2dly. Where the Power of Revocation is ſimply Collateral.

Gil. Law of Uſes 144. 50. And that is, where a Man hath no preſent Intereſt in the Land, and by the Revocation of the Eſtate is to have nothing.

Id. Ibid. 1 Rep. 174. Digge's Caſe. 51. In this Caſe, a Fine or Feoffment of the Land is no Extinguiſhing of the Parties Power; for though every Man is eſtopped to claim an Intereſt contrary to his own Act, whereby he paſſes an Eſtate to another; yet if a Man makes a Feoffment, or levies a Fine, and then revokes; whereby a Stranger claims an Intereſt; the Stranger, who is the only Perſon that can claim, is not eſtopped to claim it, for no Man is eſtopped from demanding his own Right, by the Act of another; and if there be no Eſtoppel in this Caſe, the Stranger hath a Right by the Contract.

It remains laſtly to conſider of the Manner of *Revocation*.

1 Inſt. 237. 1 Rep. 173, 174. Digge's Caſe. 52. 1ſt. If a Covenantor is Tenant for Life, having a Power of Revocation, upon revoking he is ſeized of his former Eſtate, without Entry or Claim; for he is in Poſſeſſion already; and therefore there can be no Entry, and the Claim where the Party is already in Poſſeſſion is a void Solemnity; for it doth not make any Change of Property notorious.

Id. ibid. 53. 2dly. If there be a Tenant for Life, with a Power to revoke the Remainders, and limit new ones, he may do both by the ſame Conveyance.

But where the Power is only to revoke, no new Uſes can be declared, but by ſome new Conveyance, or new Grant. 1 Str. 584. Anon. 54. For ſince upon Revocation the former Uſes are void *ipſo facto*, without any Solemnity; there is nothing to hinder why the ſame Conveyance ſhould not create new ones, and the Law to ſupport the Contract will ſuppoſe the Deſtruction of the antient Uſes to precede the Creation of the new Uſes.

1 Inſt. 215. a. 237. a. Gil. Law of Uſes 145. 55. 3dly. He may revoke Part at one Time, and Part at another; for this is not entire, like a Condition, for a Condition is entire, becauſe the Eſtate muſt be defeated in the ſame Manner that it is made; for otherwiſe the Solemnity of the Entry will not be equivalent to the Solemnity of Livery; but a Revocation is in the Nature of a Limitation, and there is no Solemnity neceſſary to the defeating the Eſtate; and therefore it may be done by Parts; conſequently if a Fine be levied of Part, that is a Revocation only of that Part.

Gil. Law of Uſes 145. 56. 4thly. The Power of Revocation follows the Eſtate.

Cites Ley 55, 57. Allen's Caſe. 57. Thus in a Covenant to ſtand ſeized to the Uſe of *A.* for Life, Remainder to *B.* and his Heirs, with Power of Revocation upon Payment of

of Money by *A.* or his Aſſigns, to *B.* or his Aſſigns; if *B.* dies, *A.* may tender to the Heir, who is in Law the Aſſignee to this Purpoſe.

58. 5thly. A Power of Revocation is in ſome Caſes a Forfeiture.

59. If there be Tenant for Life, with Power of Revocation over the Eſtates in Remainder; and the Revocation depends upon Circumſtances inſeparably annexed to the Perſon of Tenant for Life, this cannot be forfeited; but if it depends upon Circumſtances, which may be performed by another, the King ſhall take Advantage of it, and revoke the Uſes; as if the Revocation is to be by Writing under the Parties own Hands and Seals, this cannot be forfeited to the King; but if the Revocation is to be upon Tender of a Ring by himſelf, or any other for him during his Life, this Power is forfeitable. 1 Vent. 128, to 132. Smith *v.* Wheeler. Gil. Law of Uſes 146.

60. 6thly. If a Man makes a Feoffment with Power of Revocation, when he hath executed that Power, he cannot limit new Uſes upon the ſame Feoffment; but otherwiſe it is, if he had a Power to revoke and limit new ones on the ſame Feoffment, for then he might revoke and limit new Uſes, with a ſecond Power of Revocation, *&c.* and ſo *in infinitum.* 1 Vent. 198. Jones *v.* The Counteſs of Mancheſter. 2 Roll. Abr. 262.

61. Where a Conveyance to Uſes enters by way of Tranſmutation of Poſſeſſion, the Uſes may be revoked without Deed. 2 Salk. 677. Jones *v.* Morley.

3. How they may be ſuſpended, revived or extinguiſhed.

62. It has been ſhewn that where a Feoffment, *&c.* is made to Feoffees to contingent Uſes, and the Feoffees make a Feoffment over before the contingent Uſes happen to be in *Eſſe*, that thereby the Uſes are deſtroyed for ever.

63. But if, in caſe of a Feoffment to contingent Uſes, the Feoffees are *diſſeized* before the contingent Uſes veſt, hereby theſe contingent Uſes are only *ſuſpended:* And by the Re-entry of the Feoffees the antient Uſes will be *revived.*

64. And therefore if the Feoffees releaſe to the Diſſeizor, and thereby bar themſelves of their Entry, the Uſes are *extinguiſhed*, and ſhall not be revived; and the Party grieved has no Remedy but in Chancery againſt the Feoffees for Breach of Truſt.

(H) Of the Caſes out of the Statute.

1. IT has been obſerved that there are three Ways of creating an Uſe or Truſt, which the Statute cannot execute; as where Uſes are limited upon Uſes; or where a Term is raiſed and limited in Truſt; or laſtly, where Lands are limited to Truſtees to pay over the Rents and Profits. See ante, Letter D.

1. Where Uſes are limited upon Uſes.

2. Thus if a Man bargain and ſells his Lands to *A.* to the Uſe of *B.* the Statute cannot execute the Uſe in *B.* for by the Bargain and Sale, which implies a Conſideration, there is an Uſe in *A.* and before the Statute it was impoſſible that two diſtinct Perſons ſhould have the Uſe of the ſame Land. Gil. Law of Uſes 162.

3. And by the Statute, the firſt Uſe cannot be executed in *A.* ſince there could not be two plenary Poſſeſſors, and the ſecond Uſe being contrary to the Diſpoſition to *A.* muſt be null and void; but the Chancery that looks upon the Intereſt of the Parties in Conveyances, conſtrues *A.* only as an Inſtrument to take the legal Eſtate, and that in Conſcience he is bound to anſwer the Truſt to *B.* which he hath taken; *Quære tamen*, if the Conſideration moves from *A.* Chan. Ca. 114, 115. Aſh *v.* Gallen. Gil. Law of Uſes 162.

4. If

Gil. Law of Uſes 162. Pop. 81. Dillon v. Fraine.

4. If a Man doth enfeoff another to the Uſe of *J. S.* and his Heirs, and upon this Conſideration, that if *J. N.* ſhall pay ſo much Money, then the ſaid *J. S.* and his Heirs ſhall be ſeized to the Uſe of *J. N.* and his Heirs, *J. N.* pays the Money, the Uſe is not executed to him by the Statute; but the Court of Chancery will undoubtedly ſupport ſuch Truſt.

4 Rep. 4. Vernon's Caſe.

5. A Deviſe ſuppoſes a Conſideration, and therefore it cannot be averred to any other Uſe than to the Uſe of the Deviſee, for that were an Averment contrary to the Deſign of the Will appearing in the Words.

2 Vent 312. Burchett v. Durdunt.

6. But if an Uſe be expreſſed, it ſhall be to the Uſe of *Ceſtui que Uſe*, and will execute; for the Will has only an implied Uſe, where no other is limited, and *Expreſſum facit ceſſare Tacitum.*

Id. Ibid. Gil. Law of Uſes 162.

7. But if Lands be deviſed to *A.* during the Life of *B.* in Truſt for *B.* the Remainder to the Heirs of *B.* now living; this is a Chancery Truſt in *B.* and not evacuated by the Statute; for this was the Deſign of limiting an Eſtate to *A.* that a Tail might not be evacuated in *B.* whereby he might have a Power to dock it.

2. Where Terms are raiſed and limited in Truſt; and theſe Limitations are Two-fold.

1. Of ſuch as wait on an Inheritance.
2. Terms in Groſs.

1. Of Terms which wait on the Inheritance.

Gil. Law of Uſes 163.

8. The Original of theſe was in the Time of Queen *Elizabeth*, when mortgaging by way of raiſing Terms was invented; and then if a Marriage Settlement was made, or a Purchaſe upon a valuable Conſideration, and the Mortgage was diſcharged by the Purchaſe-Money, or the Marriage-Portion, it was thought fit to take an Aſſignment of the Term in Truſt to the ſame Perſons to whom the Inheritance was limited, to protect it againſt latter Mortgages.

Caſ. of Perp. 3, 4, 5, 11.

9. And hence it is, that if the Inheritance was limited in Tail, with Remainder over, the Truſt of the Term might be limited in the ſame Manner; and therefore if the Tail was docked by Fine and Recovery, the Truſt of the Tail and Remainders ceaſed, and attended the Inheritance in Fee, for the Truſts could not protect or attend theſe Eſtates that were not in Being, and the Truſtee, who is but an Inſtrument to protect others, cannot have it to his own Uſe.

Ibid. 3, 11.

10. The intailing a Term is not within the Statute *de donis Condit.* for that Statute extends only to Eſtates of Inheritance, and not to Chattels, which the Rules of Common Law have carried into another Channel.

Ibid. 3. Gil. Law of Uſes 164.

11. And therefore in this Caſe the Truſtee and Tenant in Tail may diſpoſe of it without a Fine or Recovery; and this upon valuable Conſideration, will bind the Iſſue; becauſe, ſince the Chancery are not bound by the Statute, they are at Liberty to direct the Rules of Equity, and it is not Equity to ſet up the Truſt to the Iſſue when the Anceſtor has received for it a valuable Conſideration.

Ibid.

12. It will likewiſe be Aſſets to pay Inteſtates Debts, for all Chattels of Inteſtates are Aſſets at Common Law; and it is not Equity to direct it otherwiſe.

Gil. Law of Uſes 165.

13. But if the Inheritance of an Uſe be intailed, the Alienation of Tenant in Tail, will not deveſt it out of the Iſſue, for it is within the Intent of the Statute *de Donis*, which ſays, that if an Eſtate be thus limited, the Donee

Donee ſhall not alien to prejudice his Iſſue; and the Chancery interpreting Men's Contracts, is bound by the Intent of an Act of Parliament.

50. If a Term be given to *A.* in Truſt for *B.* in Tail, with Remainder over, attendant on an Inheritance, and *A.* ſurrenders to *B.* this ſhall not deſtroy the Remainder; for though the Surrender deſtroys the Eſtate at Law, yet the Truſt remains in Equity, if the Party had Notice. Gil. Law of Uſes 165.

51. But in caſe *A.* or *B.* had aliened upon valuable Conſideration without Notice, this would have deſtroyed the Equity of the Iſſue and the Remainder-Man. Id. ibid.

2. Of Terms in Groſs.

52. Concerning Terms in Groſs much hath been ſaid already, it only remains to add, That

53. If a Leaſe be limited in Truſt, and the Truſtee renews the Leaſe, it ſhall be to the Benefit of *Ceſtui que Truſt*; for if the Truſtee takes on him the Truſt, he takes upon him to act for the Benefit of the Party to whom the Advantage of the Term was originally deſigned. 1 Ch. Caſ. 190 Holt v. Holt.

3. Where Lands are limited to Truſtees to pay over the Rents and Profits.

54. If Lands are deviſed to Truſtees and their Heirs, in Truſt for a Feme Covert, and that the Truſtees ſhall from Time to Time pay and diſpoſe of the Rents and Profits to the ſaid Feme Covert, or to ſuch Perſons as ſhe, whether Sole or Covert, ſhall appoint, and that her Huſband ſhall have no Benefit thereof; and as to the Inheritance, in Truſt to ſuch Perſons as ſhe by Will, or other Writings under her Hand, ſhould appoint; and for want of ſuch Appointment, to her and her Heirs; this ſhall be a Truſt, and not an Uſe executed by the Statute. 1 Vern. 415. Nevil v. Saunders.

55. But where a Man deviſed the Rents and Profits of certain Lands to *T. B.* the Wife of *W. B.* during her natural Life, to be paid by his Executors, into her own Hands, without the Intermeddling of her Huſband, and after her Deceaſe he deviſed them to others; it was held by *Rokeby* and *Eyre* Juſtices, that the Lands themſelves belonged to the Wife, againſt *Holt* Ch. J. who held ſtrongly, that the Executors were only Truſtees for the Wife. 1 Salk. 228. South v. Alleine. Comb. 375. S. C. and 5 Mod. 63. by the Name of Buſh v. Allen. Adjudged by two Juſt. againſt the Opinion of Holt Ch. J. but the Reporters differ as to the Opinion of the Ch. J.

56. Likewiſe where Lands were deviſed to Truſtees and their Heirs, in Truſt to pay ſeveral Legacies and Annuities, and to pay the Surplus of the Rents and Profits to a married Woman, during her Life, for her ſeparate Uſe, or as ſhe ſhould direct; and after her Death the Truſtees to ſtand ſeized to the Uſe of the Heirs of her Body, with Remainders over; the Queſtion was, whether this Deviſe to pay the Surplus of the Rents and Profits to the Wife, was ſuch an Uſe or Truſt as was executed by the 27 *H.* 8. for if it was, then it was urged, that ſhe being Tenant for Life, the Limitation after to the Heirs of her Body being coupled with it, gave her an Eſtate-Tail, according to *Shelley*'s Caſe, 1 *Rep.* but if it did not, then the eldeſt Son was to take as a Purchaſer; and it was held by the Court, that ſhe had only a Truſt for Life, and conſequently the Heirs of her Body muſt take by Purchaſe; and the rather in this Caſe, becauſe it was limited to the Heirs of her Body ſeverally and ſucceſſively, as they ſhould be in Seniority of Age and Priority of Birth, and the Heirs of their reſpective Bodies iſſuing; and a Difference was taken between this 1 Caſ. Eq. Abr. 383. Jones v. The Lord Say and Seal.

Caſe

Case and that of *Broughton* and *Langley*, 2 *Salk.* for there it was to permit *A.* to receive the Rents and Profits for Life; but here it is a Trust in the Trustees to pay over the Rents and Profits to such and such Persons; and therefore the Estate must remain in them to answer these Trusts; otherwise she must be the Trustee, contrary to the express Words of the Will.

2 Salk. 679. Broughton v. Langley. And *per* Holt Ch. J. the same *Point. cont.*

57. But if Lands are devised to Trustees and their Heirs, on Trust to permit *A.* to take the Profits for his Life, and after the Trustees to stand seized to the Use of the Heirs of the Body of *A. A.* has an Estate-Tail executed in him; for this being a plain Trust at Common Law, what is so, must be executed by the Statute, which mentions the Word *Trust* as well as *Use*.

in the Case of Burchett v. Durdant, 2 Vent. 312. is not Law.

(I) Of resulting Uses, or Uses by Implication.

1. HERE it is to be premised that the mere Alteration of Possession, does not, in *Equity*, give a Right, but it shall be to the Use of the Donor, &c. unless the Use is *expressed*, or there is a *valuable Consideration*. Thus,

Bro. F. al Uses, pl. 32. In this Case the Law

2. If a Man makes a Feoffment without Consideration, and expresses no Use, the Feoffment is intended by the Law to be to the Use of the Feoffor, and his Heirs.

makes not any Consideration, because the Feoffee shall not hold of the Feoffor, &c. but of him of whom the Feoffor held; and this by the Statute of *Quia Emptores*, &c. Dy. 146. b. pl. 71. S. P. Arg. in Case of Villers v. Beaumont———But before the Statute *Quia Emptores terrarum*, if a Man made a Deed of Feoffment *without any Consideration* or Cause, the Feoffee should have had this to his own Use, because there was *Tenure between* Feoffor and Feoffee. Dy. 146. b. pl. 71. Villers v. Beaumont. And see Barnard. Chan. Rep. 387. Lloyd v. Spillit.

And. 37. pl. 95. Anon. There is a Difference between raising Uses by Fine,

3. But if one, without any Consideration, enfeoffs another by Deed, to hold to the Feoffee and his Heirs to his own Use, and the Feoffee suffers the Feoffor to occupy the Land several Years, yet the Right is in the Feoffee, because *express* Use is contained in the Deed, which is sufficient without other Consideration; the same Law is when a Feoffment is made to the Use of a Stranger and his Heirs.

Feoffment or other Conveyance which operates by Transmutation of Possession, and Uses raised by Covenant; for upon the first, if no Uses were expressed, it is Equity that assigns the Feoffor to have the Use; for by the Law the Feoffor has parted with all his Interest; but where he expresses Uses, there can be no Equity in giving him the Use against his own Will; and there can be no Presumption that the Conveyance was to the Use of the Feoffor against his own Declaration; but in Case of a Covenant, it is Equity that must give an Use; for the Person can have no Right by Law; therefore in such Case there can be no Use without a Consideration; for there is no Equity that there should. Gil. Law of Uses, &c. 222, 223.

2 Le. 19. pl. 25. in Brent's Case.

4. That which cannot vest in him to whom it is limited, shall return to the Feoffor; as if I make a Feoffment in Fee to the Use of myself for Life, and after to the Use of my second Wife, all the Fee is now in me; and when I take a second Wife, then the Feoffees shall be seized to the Use of such Wife in Remainder for her Life; *per Manhood* J.

5. Likewise

5. Likewiſe if one ſeized of Land of the Part of his Mother makes Feoffment in Fee without Conſideration, he ſhall be ſeized as he was before, *viz.* of the Part of the Mother. 2 Rep. 58. a. Beckwith's Caſe.

6. In like Manner, if a Man ſuffers a common Recovery, or levies a Fine of Land, and limits no Uſe, this ſhall be to the Uſe of him who ſuffers the Recovery or levies the Fine. Godb. 180. Bury v Taylor. Where one ſeized in Tail ſuffers a Recovery, and declares no Uſes, the Uſe reſults to the Tenant in Tail, and he becomes ſeized in Fee by Virtue of the Recovery, becauſe the Recoveror is Tenant in Fee-Simple, and then no Uſes are declared of that Recovery; and where no Conſideration appears from the Recoveror, the Recovery can be to no other Purpoſe than to dock the Entail. Gil. Law of Uſes 61.

7. Likewiſe if two join in a common Recovery where one has nothing in the Land, and no Uſe is limited upon it, this ſhall be to the Uſe of him only who had the Intereſt in the Land, and no Uſe ſhall ariſe to the Stranger. 2 Roll. Abr. 789.

8. Alſo if *A.* Tenant for Life, and *B.* in Reverſion or Remainder levy a Fine, generally, the Uſe ſhall be to *A.* for Life, the Reverſion or Remainder to *B.* in Fee; for each grants that which he lawfully may, and each ſhall have the Uſe which the Law veſts in them according to the Eſtate which they convey over. 2 Rep. 58. a. Beckwith's Caſe.

9. So if there are two Jointenants, the one for Life and the other in Fee, and they levy a Fine without declaring any Uſe, the Uſe ſhall be to them of the ſame Eſtate as they had before in the Land. Id. Ibid.

10. It is to be obſerved likewiſe, that when one takes a Feoffment, having Notice of the ſeveral Uſes and Truſts, there the Party is ſuppoſed to take it under thoſe Uſes and Truſts; for the Law will ſuppoſe a Man's Actions rather juſt than otherwiſe. Gil. Law of Uſes 7.

11. Therefore if a Feoffee to an Uſe makes a Feoffment in Fee upon a valuable Conſideration with Notice, the ſecond Feoffees ſhall be ſeized to the former Uſes, for the Conſideration imports a Seizin to his own Uſe, the Notice a Seizin to the former Uſes: And where the Act is capable of a double Interpretation, that muſt be taken which conſiſts moſt with Equity. Gil. Law of Uſes 7. The Reaſon is for that it argues a corrupt Conſcience to bargain for an Eſtate which the Purchaſer knows to be another's in Equity; therefore a Conſideration or no Conſideration in an Iſſue at Law; ſo Notice or no Notice is an Iſſue in Chancery. Ld. Bacon's Read. on Stat. of Uſes. But Q. If the Uſe is *expreſſed* to the ſecond Feoffee, for there it ſeems Notice or no Notice is immaterial. 1 And. 314.

12. Likewiſe if *A.* agrees with *B.* to leaſe *Bl.* Acre to him for certain Years, and afterwards, before he has made the Leaſe, according to the Promiſe, he enfeoffs *C.* of the Land for a valuable Conſideration, *C.* having Notice of the Promiſe before the Feoffment made; *C.* ſhall be compelled in Chancery to make the Leaſe to *B.* according to the Promiſe, becauſe of his Notice. 2 Roll. Abr. 781.

13. But where a Man takes upon a valuable Conſideration without Notice, there he is ſuppoſed to take it to his own Uſe, for otherwiſe he would not have given an Equivalent.

14. Therefore if a Feoffment be made with Conſideration, and without Notice, the Feoffee ſhall be ſeized to his own Uſe, for here the Act is capable of no other Conſtruction. 1 Rep 122. Chudleigh's Caſe.

15. Alſo if Feoffee in Uſe makes a Gift in Tail, the Donee ſhall be ſeized to his own Uſe; for there is a Conſideration, *viz.* a Tenure between them, unleſs he expreſs an Uſe upon the Gift, or in the Gift; *per Brooke* J. Bro. F. al. Uſes, pl. 10.

16. If the Feoffee in Uſe makes a Leaſe for Life, he ſhall have Fealty; for this is to the Uſe of the Leſſee, if an Uſe be not expreſly reſerved, *&c. per Brooke* J. Id. Ibid.

17. In

Id. Ibid. 17. In like Manner if he deviſes by Teſtament, the Deviſee ſhall be ſeized to his own Uſe, unleſs it be otherwiſe expreſſed; for there is a Conſideration implied.

Noy 19. per Popham Ch. J. in Caſe of Yelverton *v.* Yelverton. 18. So if a Feoffment be made to *A.* to enfeoff *B.* to the Uſe of *C.* and *A.* enfeoffs *B.* without limiting of any Uſe, yet it ſhall be to the Uſe of *C.*

(K) Of ſecond or ſhifting Uſes.

Bro. F. al. Uſes, pl. 30. cites 6 E. 6. 1. IF a Man made a *Feoffment in Fee* before the Statute of Uſes, 27 *H* 8. *c.* 10. or after the Statute *to the Uſe of* W. *and his Heirs till* A. *paid* 40*l.* to the ſaid *W.* and *then to the Uſe of the ſaid A. and his Heirs*, and after comes the Statute of Uſes and executes the Eſtate in *W.* and after *A. pays W.* the 40*l.* there *A. is ſeiſed in Fee if he enters*; by ſeveral. But by ſome, *A.* ſhall not be ſeized in Fee by the ſaid Payment, unleſs the Feoffees enter; *Quære Inde.* And therefore it ſeems to be the ſureſt Way to enter in the Name of the Feoffees, and in his own Name, and then the one Way or the other the Entry ſhall be good, and in ſhall make *A.* to be ſeized in Fee: And therefore a Man at this Day may make a Feoffment to Uſes, and the Uſe *ſhall change from one to another by Act* ex poſt facto *by Circumſtance*, as well as it ſhould before the Statute 27 *H.* 8. of Uſes.

Ld. Bacon on the Statute of Uſes 351. 2. So if I limit an Uſe *jointly to two Perſons not in Eſſe*, and the *one comes to be in* Eſſe, he ſhall take the entire Uſe; and yet if *the other afterwards comes in* Eſſe, he ſhall take jointly with the former.

As if I make Feoffment *to the Uſe of my Wife that ſhall be and my firſt begotten Son for their Lives*, and I marry; my Wife takes the whole Uſe; and if I afterwards have a Son, he takes jointly with my Wife. Ld. Bacon on the Statute of Uſes 351.

Dy. 314. pl. 96. Anon. 3. Where a Conveyance was made by Fine to *A. B. to the Uſe of* C D. *and* M. *his Wife for Life*, and the longer Liver of them, Remainder after their Deceaſe to the *Uſe of* C.'s *Executors for ſix Months*, and after the ſix Months ended, to the Uſe *of* E. *and* F. *his Wife, and the Heirs Male of their Bodies*, Remainder to *C.* and his Heirs, *provided if* C. *at any Time after have Iſſue* of his Body, or any Wife of *C.* at his Deceaſe be Enſient with any Iſſue begotten by *C* then *then after ſuch Iſſue had, and after* 500*l. paid to* G or tendered and refuſed, *within ſix Months after the Birth* of ſuch Iſſue, then the Uſe of the ſaid Lands, immediately after the ſix Months expired, ſhall be *to* C. *and the Heirs of his Body, and in Default to* C. *and his Heirs for ever*; *M.* dies, and *C.* marries *N. Per Plowden* and *Dyer*, before the Performance of the Contingent, *C.* has no larger Eſtate than he had before.

Cro. Eliz. 765. Caſe of Wood *v.* Reynold, cites it as the Caſe of Leigh *v.* Burton. 4. So where *A.* made a Feoffment to the Uſe of *himſelf for Life*, Remainder to his *Wife for Life*, Remainder to his right Heirs, with a *Proviſo* if his Son interrupted his Wife it ſhould be *to the Uſe of the Wife and her Heirs. A.* made a Leaſe for Years, to begin after * his Deceaſe, and died. The Son diſturbed the Wife. Reſolved, that the Uſe will not ariſe to give the Wife the Fee.

And Godfrey Arg. ſaid he conceived the Reaſon thereof to be, becauſe the *Uſe limited to the right Heirs was the ancient Reverſion, and no new Eſtate*, and a *Condition cannot be annexed* thereto. Ibid.——Mo. 742. pl. 1022. Barton's Caſe, ſays it was to begin after the * Wife's Deceaſe. Reſolved, by Popham and Anderſon Ch. J. clearly, that the future Uſe was checked by the Leaſe, and never ſhall ariſe, for ſince it could not ariſe at the Death of the Wife, by reaſon of the Leaſe for Years, it is deſtroyed for ever; yet *nota* (ſays the Reporter) that the Leaſe was only an *Intereſſe Termini* all the Time of the Wife's Life, and the Diſturbance which ought to raiſe the Uſe in Fee to the Wife, was made in her Life before the Commencement of the Leaſe.—Gil. Law of Uſes, &c. 138, 139. cites S. C. and ſays the Wife ſhall not have the Reverſion, becauſe the Leaſe has altered it; for there is the ſame Eſtate to be executed in the Wife as was in Being at the Diſpoſition of the particular Eſtate.

5. Likewiſe

5. Likewiſe where *A. bargained and ſold Land to* B. *and his Heirs* for 500 *l. upon Condition* that *if* A. *paid* B. 500 *l.* he might *re-enter, and be ſeized to the Uſe of himſelf and his Heirs, until* he attempt to alien without the Aſſent of *B. and then to the Uſe of* B. *and his Heirs*, and a *Fine* was levied to thoſe Uſes: *A.* paid the 500*l.* and entered; afterwards *A.* aliened to *J. S.* without the Aſſent of *B. Per Ld C. Egerton*, no Uſe will ariſe to *B.* becauſe *B.* entering for the Condition broken, ought to be in of the old Uſe and Eſtate, and cannot be ſeized to any other Uſe. Moor 761. pl. 1054. in Chancery, Holloway *v.* Pollard.

(L) Of the Manner of pleading Uſes.

1. IF a Man pleads that *A. B.* and others were ſeized to his Uſe in Fee, this is good Pleading, without ſhewing the Commencement of the Uſe. Br. Pleadings, pl. 170. cites 13 H. 7. c. 18.

2. But it is otherwiſe where he ſays that they were ſeized to the Uſe of him and his Heirs of his Body, becauſe this is a particular Eſtate. Id. Ibid.

3. If a Man makes a Feoffment in Fee to *A.* to the Uſe of *B. B.* may plead this Feoffment, and ſhew that *J. S.* diſſeized him, without laying any *actual Entry*, for the Statute executes the Poſſeſſion in him; he may alſo plead it without ſhewing any Agreement thereto, becauſe the Freehold is in him, unleſs he diſagree, and then it muſt be ſhewn on the other Side, for thereby the Freehold is immediately out of him. Owen 86. Green *v.* Wiſeman. Gil. Law of Uſes 81.

4. But in Treſpaſs he muſt ſhew an actual Entry; for this Action is grounded on the Diſturbance of his Poſſeſſion, or the Violation of his Right, by taking the actual Profits, which no Man could hinder him from, or diſturb him in, till he ſhews he was in Poſſeſſion. Owen 87. Green *v.* Wiſeman.

5. If a Man pleads that he bought Land for 20 *l.* without ſhewing the Money paid, or a Day alledged for the Payment of it, this is good; for Buying implies Payment of the Money; and if there was none paid, the Plaintiff may reply, that he did not buy, *&c.* Bro. F. al. Uſes 338. b. pl. 15.

6. In Debt the Plaintiff counted upon a Leaſe for Years made by his Father, rendring Rent. The Defendant ſaid, that the Father and others were ſeized in Fee to the Uſe of the Father, *abſque hoc* that the Reverſion deſcended to the Plaintiff. And it was held a good Plea to the Count, for the Plaintiff ought to have counted ſpecially that they were ſeized to the Uſe, *&c.* and that the Father leaſed, and becauſe he did not, the Writ and Count ſhall abate; *per Rede* Ch. J. and *Kingſmill* J. for *per Rede*, the Defendant may ſay that the Father had nothing at the Time of the Demiſe, and then the Plaintiff cannot maintain the Declaration by the Uſe, but it is a *Departure*; for he ought to have ſhewn it at firſt. Br. Count, pl. 49. cites 21 H. 7. c. 25.

7. The Tenant of the Land cannot plead a Releaſe made by *Ceſtui que Uſe* to the Feoffee, without ſhewing the Releaſe. Br. Monſtrans *defaites*, &c. pl. 61. cites 14 H. 8. 4.

8. In Waſte the Writ ſet forth a Feoffment to ſeveral Perſons to ſeveral Uſes. After Verdict Exception was taken to the Writ, becauſe it did not ſay the Feoffment was to them and their Heirs, without which there could be no Inheritance in *Ceſtui que Uſe*, and ſo no Diſheriſon, as the Action of Waſte imports; but the Plaintiff had Judgment, becauſe all the Forms of the Writs had been ſo ſince the making the Statute; and the Declaration laid the Seizin in Fee, as it muſt; and yet the Plaintiff might have had a general Writ, and declared ſpecially. Hob. 84. pl. 112. Sheat *v.* Coxenbridge.

9. We proceed now to treat more particularly of the latter Branch of this Title, and to conſider the Law reſpecting *Truſts*.

USES

USES and TRUSTS.

1 Mod. 17. 1. Smith *v.* Wheeler. Ibid. 38 Arg. in S. C. Chan. Rep. 52. Earl of Newcaſtle *v.* Earl of Suffolk.

A Truſt is a Right to receive the Profits of the Land, and to diſpoſe of the Land in Equity; *per Pemberton Arg. Mod.* 17. in the Caſe of *Smith* v. *Wheeler.* And holding the Poſſeſſion and diſpoſing thereof at his Will and Pleaſure, and making Leaſes thereof when the legal Eſtate is in others, are Signs of a Truſt.

Allen 15. the King *v.* Holland.

2. Truſts are of the ſame Nature now that Uſes were at Common Law. *Arg. Allen* 15. *in Caſe of the King* v. *Holland.*

Abr. Equ. Caſe 220. S. P. Symſon *v.* Turner.——S. P. Arg. Vent. 130. in Caſe of Smith *v.* Wheeler ——A Truſt is but a new Name given to an Uſe, and invented to defraud the Statute of Uſes, * Arg. Sti. 40. in Caſe of the King *v.* Holland.

* It has already been obſerved that now the Uſe by the way of Truſt, (which were one and the ſame before the Statute) remains ſeparately in ſome Perſons, and the Poſſeſſion ſeparately in others, as it did before the Statute, and are not brought together but by Decree in Chancery, or the voluntary Conveyance of the Poſſeſſor of the Land to *Ceſtui que Truſt.*

But for the better underſtanding of this Head, we ſhall divide it into the following Branches; and conſider,

(A) By what general Rules Truſts are governed.
(B) What amounts to a Declaration of Truſt, and when a Truſt ſhall be raiſed.
(C) What ſhall be deemed a reſulting Truſt, or Truſt by Implication.
(D) What ſhall be deemed an Advancement, and what a Truſt.
(E) What Acts of a Truſtee ſhall be a Breach of Truſt, &c. or ſhall be deemed to alter or vary the Nature of it.
(F) What Acts of the Truſtee jointly with Ceſtui que Truſt, or by Ceſtui que Truſt only, ſhall defeat the Truſt, or deſtroy contingent Remainders.
(G) In what Caſes Equity will decree Truſtees to join in a Recovery, &c. with Ceſtui que Truſt.
(H) When a Truſt is to be executed, what Eſtate or Intereſt is to be conveyed, and to whom.
(I) Truſtee in what Caſes favoured, and in what Caſes decreed to Account.
(K) How far Truſtees are anſwerable for each other.

(L) In

(L) In what Caſes Truſtees ſhall give Security; and when be diſcharged or removed.
(M) The Power of Ceſtui que Truſt.
(N) Of Forfeitures by Ceſtui que Truſt.

(A) By what general Rules Truſts are governed.

1. *TRUSTS and legal Eſtates are to be governed by the ſame Rules*; and this is a Maxim which has univerſally prevailed. It is ſo in the Rules of *Deſcent*, as in *Gavelkind*, and *Borough Engliſh* Lands; there is a *Poſſeſſio Fratris* of a Truſt, as well as of a legal Eſtate. The like Rules in *Limitations*, and alſo of *barring Entails* of Truſts, as of legal Eſtates; *per* the Maſter of the Rolls, who ſaid he thought there was no Exception out of this general Rule, nor is there any Reaſon that there ſhould; and that it would be impoſſible to fix Boundaries, and ſhew how far, and no farther, it ought to go; and that perhaps in early Times the Neceſſity of keeping thereto was not ſeen, or thoroughly conſidered. 2 P. Wms's Rep. 645. Sutton v. Sutton.

2. *A.* being ſeized in Fee of certain Lands deviſed them to Truſtees in Fee, in Truſt to pay his Debts, and to convey the Surplus to his Daughters equally; the younger married and died, leaving an Infant Son, and her Huſband ſurviving; the eldeſt Daughter brought a Bill for a Partition; and the only Queſtion was, whether the Huſband of the younger Daughter ſhould have an Eſtate for Life conveyed to him, as Tenant by the Curteſy? Upon which it was—— 1 P. Wms. 108. Whatts v. Ball.

3. Decreed by Lord Chancellor, that Truſt Eſtates were to be governed by the ſame Rules, and were within the ſame Reaſon, as legal Eſtates; and as the Huſband ſhould have been Tenant by the Curteſy, had it been a legal Eſtate, ſo ſhould he be of this Truſt Eſtate; and if there were not the ſame Rules of Property in all Courts, all Things would be, as it were, *at Sea*, and under the greateſt Incertainty.

(B) What amounts to a Declaration of Truſt, and when a Truſt ſhall be raiſed.

1. *THE Statute of* 29 Car. 2. cap. 3 ſ. 7. *Enacts, That all Declarations or Creations of Truſt ſhall be manifeſted by ſome Writing ſigned by the Party, or by his laſt Will in Writing, or elſe ſhall be void. And by*—

2. S. 9. *Aſſignments of Truſts ſhall be in Writing ſigned by the Party aſſigning the ſame, or by his laſt Will, or elſe ſhall be of no Effect.*

3. But Words which are not *altogether Artificial*, will ſerve to direct a Truſt, which will not ſerve to limit an Eſtate; *per Lord Keeper.* Fin. Rep. 159. Nourſe & al' v. Yarmouth.

4. Where *A.* deviſed all his Lands to *B.* and the Heirs of his Body; and in another Part of his Will, reciting that he owed *B.* Money upon Account, he therefore deviſed to him all his perſonal Eſtate, and made him Executor, willing him to pay his Debts; and upon the Reading of the Will, though the Clauſe as to the Payment of Debts ſeemed to relate 1 Vern 411. Clowdſly v. Pellham.

to the perſonal Eſtate only; and though the Lands were deviſed to *B.* in Tail, with a Remainder over to another; and that it was objected, that a Tenant in Tail could not be a Truſtee; yet the Court decreed both real and perſonal Eſtate to be ſold for Payment of the Teſtator's Debts, and the Decree, it is ſaid, was affirmed in the Houſe of Lords.

2 Vern. 228. Alcock *v.* Sparhawk. 5. So if *J. S.* deviſes his Lands to his Brother, who is his Heir at Law in Fee, and likewiſe deviſes ſeveral Legacies, and makes his Brother Executor, deſiring him to ſee his Will performed according to the Truſt and Confidence he had repoſed in him; this makes the real Eſtate liable; for the Teſtator needed not to have deviſed the Eſtate to his Brother, being Heir at Law, unleſs he intended that he ſhould take them chargeable with the Debts and Legacies. Decreed and affirmed by the Houſe of Lords.

Fin. R. 356. Goodwin *v.* Cutler. 6. A Truſt was decreed of a Term for Years aſſigned, though the Truſt was *not expreſſed in the Deed*; yet it having been ſo declared by the Aſſignee, who had given *Bond to perform the Truſt*, the ſame was decreed accordingly.

2 Vern. 106. Crooke *v.* Brooking. 7. If a Man deviſes 1500 *l.* to *A.* and *B.* for ſuch Uſes as the Teſtator had declared to them, and by them not to be diſcloſed, and he diſcloſes the Truſt to *A.* who by Letter diſcloſes it to *B.* this ſhall be a Truſt, and the Letter is a good Declaration thereof.

1 Chan. Caſ. 198. Martin *v.* Douch. 8 But if a Man deviſes 40 *l.* to be paid to his Couſin *J. S.* and by him to be diſpoſed of in ſuch Manner as the Teſtator ſhould by a private Note acquaint him with, and he dies without having made any ſuch Appointment; this ſhall be a good Bequeſt to *J. S.* and ſhall not go to the Executors, from whom it was intended to have been given away.

2 Vent 345. Lord Hollis's Caſe. 9. *A.* lent *B.* 100 *l.* and in the Note which was given for it, mention was made that it ſhould be diſpoſed of as *A.* ſhould direct; on a Bill exhibited for it, the Court declared it was a *Depoſitum* or Truſt, and decreed Payment of it, though it was barred by the Statute of Limitations.

2 Vern. 288. Hampton *v.* Spencer. 10. *A.* in Conſideration of 80 *l.* conveys an Eſtate abſolutely to *B.* and afterwards *A.* brings a Bill to redeem, and *B.* by Anſwer inſiſts that the Conveyance was abſolute, but confeſſes it was in Truſt, that after the 80 *l.* paid, with Intereſt, he was to ſtand ſeized for the Benefit of the Wife and Children of *A.* though no Truſt was declared in Writing, and *A.* replies to the Anſwer: And it was inſiſted that *A.* having replied, and Defendant having made no Proof of the Truſt, no Regard ought to be had to the Matter ſet forth in Avoidance of the Plaintiff's Demand; yet the Court decreed the Truſt for the Benefit of the Wife and Children.

1 Vern. 296. Thynn *v.* Thynn. 11. So if *J. S.* makes his Will, and his Wife Executrix, and the Son afterwards prevails on his Mother (by telling her that the Executorſhip would be troubleſome to her, *&c.*) to get *J. S.* to make a new Will, and name him Executor therein, he promiſing to be a Truſtee for the Mother, which is done accordingly, and in that Will there is but a ſmall Legacy given the Wife; this will be decreed a Truſt for the Wife on the Point of Fraud, notwithſtanding the Statute of *Frauds* and *Perjuries*, which requires a Declaration of Truſt in Writing.

Chan. Caſ. 310. Civil *v.* Rich. 12. But where one poſſeſſed of Leaſes for Years deviſed them to his Wife, and hoped ſhe would leave them to his Son, and died; and her ſecond Huſband granted the Leaſes away: And the Son ſued to be relieved, his Bill was diſmiſſed; for it was no Truſt for the Son. Cited by Lord Chancellor as a Caſe he remembered in Lord *Egerton*'s Time.

MSS. Rep. Fry *v.* Fry. in Chan. Trin. 27 G. 2. 13. With reſpect to raiſing of Truſts, it has been held that were a Truſt is created by Marriage Settlement or Will, or a Truſt of a Term to raiſe Money at 21 or Marriage, and the Perſon dies before the Time, a Court of Equity will not ſuffer the Truſtee to raiſe the Money at Law.

14. Where

14. Where *A.* by his Will deviſed his real Eſtate to his Wife for Life, with Remainders over, and gave a Legacy to his Daughter, to be paid within one Month after the Death of his Wife, and charged it upon the real Eſtate: The Daughter died in the Life of the Wife, unmarried; and after the Wife's Death the Repreſentative of the Daughter brought his Bill to have this Legacy paid out of the real Eſtate.—For the Plaintiff it was inſiſted, that this was different from the common Caſe of a Legacy payable out of the Lands, for here the Time of Payment was poſtponed out of regard to the Circumſtances of the Fund, and not of the Perſon. But by Lord Chancellor the general Rule is, that where a Legacy or Portion is given to be raiſed out of Lands, payable at a certain Time; if the Legatee or Child dies before that Time comes, and before the Time, when in the View of the Teſtator he could be ſuppoſed to want the Legacy or Portion, it ſhall ſink in the Land for the Benefit of the Heir or Deviſee; and this Rule has only been broke into in Favour of the Huſband or Children of ſuch Legatee, *&c.* where ſhe has married; but that is not the preſent Caſe, and as to the Argument made uſe of from the Circumſtances of the Fund, that is only brought as an auxiliary Reaſon; and no Caſe has been determined upon ſuch Circumſtances alone. If it had been given on a more remote Contingency, as on the Failure of Iſſue of *A.* *&c.* there might have been ſome Reaſon to have given it to the Repreſentative, as the Teſtator might probably think the Legatee could not be living at ſuch a diſtant Period. But here it depends on the Death of his Wife, which might happen in a reaſonable Time. In Caſes where it has been given to *A.* his Executors and Adminiſtrators, it ſhews the Intention of the Teſtator to make it tranſmiſſible; and where it has been charged by a Condition, or a conditional Limitation, and the Legatee has had a Remedy at Law to defeat the Deviſe of the Eſtate to the Deviſee, this Court will not interpoſe to take that Remedy from him, but will leave the Deviſee to take the Eſtate *cum onere.* But in the Caſe of a Truſt created by Marriage Settlement or Will, or a Truſt of a Term to raiſe Money at 21 or Marriage, where the Perſon dies before, this Court will not ſuffer the Truſtee to raiſe the Money at Law, where there might be a Remedy at Law contrary to the Rule of this Court. The Teſtator here in the latter Part of his Will, gives Legacies to his two Daughters, and if either of them die, her Share to go to the Survivor; this looks as if he did not intend that the Repreſentative ſhould have it even in the firſt Bequeſt, and is a farther Circumſtance to confirm the Opinion given againſt raiſing the Legacy out of the real Eſtate.—Bill diſmiſſed, but without Coſts. If this had been the Caſe of a Child who had married, and left Children, it might have been otherwiſe.

Fry *v.* Fry in Canc. Trin. 27 Geo. 2. Mſs. Rep.

(C) What ſhall be deemed a reſulting Truſt, or Truſt by Implication.

1. IT has been ſhewn under the laſt Head, that by the Statute againſt Frauds and Perjuries the 29 *Car.* 2. *c.* 3. all Declarations of Truſts were to be made in Writing; but in the ſaid Act there is a Saving with regard to Truſts reſulting by Implication of Law, which are left on the Footing whereon they ſtood before the Act; now a bare *Declaration by Parol* before the Act, would prevent any reſulting Truſt. *Arg.* and the Court ſeemed to be of that Opinion.

2 Vern. 294. pl. 285. Lady Bellaſis *v.* Compton *v.* Frankland.

1 P. Wms. 112. Lamplugh v. Lamplugh.

2. It was likewiſe ruled by Lord Chan. *Cowper*, that the Statute of Frauds, *ſ.* 8. which ſays, "that all Conveyances where Truſts and Conſidences ſhall ariſe or reſult by Implication of Law, ſhall be as if that "Act had never been," muſt relate to Truſts and equitable Intereſts, and connot relate to an Uſe which is a legal Eſtate. *Mich.* 1709. in the Caſe of *Lamplugh* and *Lamplugh*.

2 Vent. 361. Anon. 1 Vern. 366. S. P. Gaſcoigne v. Thwyng.

3. If a Man purchaſes Lands in another's Name, and pays the Money, it will be a Truſt for him that paid the Money, though there be no Deed made, declaring the Truſt thereof; for the Statute of Frauds and Perjuries extends not to Truſts raiſed by Operation of Law.

Admitted; but there ſaid, "that the Proof muſt be very clear, that he paid the Purchaſe-Money."

Fitz. Gibb. 223. Fitzgerald v. Ld. Fauconbridge.

4. No Rule is more certain than that if a Man makes a Conveyance in Truſt for ſuch Perſons, and ſuch Eſtates as he ſhall appoint, and makes no Appointment, the reſulting Truſt muſt be to him and his Heirs. The Truſt in Equity muſt follow the Rules of Law in the Caſe of an Uſe, and that it would be ſo in the Caſe of an Uſe is undoubtedly true, and that was Sir *Edward Cleer*'s Caſe in 6 *Rep. per* Ld. Chancellor.

Bernard Rep. in Canc. 388. Lloyd v. Spillit. The Reaſon why the Court has allowed

5. But Truſts ariſing by Operation of Law have been but of *two* Kinds, (firſt) Either where the Conveyance has been taken in the Name of one Man, and the Purchaſe Money paid by another; or (ſecondly) Where the Owner of an Eſtate has made a voluntary Conveyance of it, and made a Declaration of the Truſt with Regard to one Part of the Eſtate, and has been ſilent with regard to the other Part of it. *Per* Lord Chancellor.

a Truſt by Operation of Law to ariſe in the latter Caſe, has been, that the Party by declaring Part of the Truſt to be for another, and by ſaying nothing with regard to the other Part of it, ſhews his Intention to be that the other was to have only one Part of the Truſt, and conſequently he himſelf ought to have the Benefit of the other Part of it. Theſe have been the only two Inſtances of Truſt allowed of, to ariſe by Operation of Law, ſince the Statute of Frauds, unleſs there has been a plain or expreſs Fraud. Where there has been a Fraud, in gaining a Conveyance from another, that may be a Reaſon for making the Grantee in that Conveyance to be conſidered merely as a Truſtee. Per Lord Chancellor. Ibid.

1 P. Wms. 323. Ambroſe v. Ambroſe.

6. Where it plainly appeared upon the Evidence of both Sides, that the Conſideration Money paid on a Purchaſe was the proper Money of *A.* (though mentioned in the Conveyance, to be paid by *B.*) in ſuch Caſe, had it not been for the Statute of Frauds, this would have made a reſulting Truſt; and *B.* after *A.*'s Death executing a Declaration of Truſt, this plainly took it out of the Statute. *Per* Lord Chancellor *Cowper*.

7. Wherever there is a Conſideration there can be no reſulting Truſt. But if a Leaſe be made for Years without a Conſideration, there will be a reſulting Truſt to the Leſſor.

Freem. 305. Lady Tyrrell's Caſe.

8. Where a Daughter's Portion was charged upon the Father's Land, ſhe at the Requeſt of her Father, had releaſed her Intereſt in the Land to the Intent that he might be enabled to make a clear Settlement thereof upon his Son. It was declared by the Lord Keeper, that if this was done by the Daughter without any Conſideration, there would be a reſulting Truſt in the Father, whereby he ſhould be chargeable to the Daughter for ſo much Money.

Ch. Prec. 8c. pl. 77. Kirk v. Webb.

9. But where a Truſtee purchaſes Lands out of the Profits of the Truſt Eſtate, and takes the Conveyance in his own Name; though probably, if he cannot make other Satisfaction for the Miſapplication, theſe Lands may be ſequeſtered, yet they cannot be decreed to be a Truſt for *Ceſtui que Truſt*, no more than if *A.* borrows Money of *B.* and purchaſes Land with it; thoſe Lands are no Truſt for *B.* for it is *not* a Truſt in Writing; and a reſulting Truſt it cannot be, becauſe that would be to contradict the Deed, by *Parol Proof*, directly againſt the Statute of Frauds. But if this Purchaſe had been recited to have been made with the Profits of the Truſt Eſtate,

Eſtate, This appearing in Writing might ground a reſulting Truſt. On Appeal to the Houſe of Lords, this Decree was affirmed.

10. So where a Teſtator *empowered the Executor to lay out the perſonal Eſtate in Land, and ſettle it on* A. *and his Heirs:* And the Executor being about to purchaſe, told *A.*'s Mother of it, and aſked her Conſent, but took the Conveyance in his own Name, and *no Truſt in Writing was declared*, but it was proved that he at ſeveral Times *declared it muſt be ſold to make* A. *Satisfaction*; yet the Court (though inclined to decree a Conveyance to *A.* the Executor being dead Inſolvent) declared it could not, becauſe there was *no expreſs Proof of the Application of the Truſt Money.* Ch. Prec. 168. pl. 139. Halcot v. Markant.

(D) What ſhall be deemed an Advancement, and what a Truſt.

1. IT is a ſettled Rule, that whenever a Father purchaſes in the Name of a Child unprovided for, it is intended as a Proviſion and not a Truſt, unleſs it be otherwiſe proved, and the Proof lies on the Plaintiff; this was held ſo before the Statute of Frauds, *&c.* and is ſtronger ſince, becauſe Declarations of Truſts ought to be in Writing, though in other Caſes a Truſt will reſult where it appears that another paid the Money. And—— 2 Freem. 252. Shales v. Shales.

2. A Diſtinction has been taken where a Parent makes a Purchaſe in the Name of an unadvanced Child, and where in the Name of a Child already advanced. In the former Caſe it was only an Advancement for the Child, in the latter a Truſt for the Parent. 2 Chan. Ca. 231. Elliot v. Elliot.

3. The Reaſon why where the Father purchaſes *in the Name of a Son unadvanced*, without any expreſs Declaration of the Truſt, this is an Advancement of the Son, and not a Truſt for the Father, is becauſe between Father and Son *the Blood is a ſufficient Conſideration to raiſe an Uſe* to the Son; and that in all Caſes whatſoever, where a Truſt ſhall be between the Father and Son, contrary to the Conſideration and Operation of Law, the ſame ought to appear upon very plain and coherent, and binding Evidence; and not by any Argument or Inference from the Father's continuing in Poſſeſſion, and receiving the Profits, which ſometimes the Son may not in good Manners contradict, eſpecially where he is advanced but in Part: And if ſuch Inference ſhall not be made by the Father's *Perception of Profits*, it ſhall never be made from any Words between them in *common Diſcourſe*; for in thoſe there may be great Variety, and ſometimes apparent Contradictions. Now where there is no clear Proof of any Truſt between the Father and Son, the Law will never imply a Truſt, becauſe the natural Conſideration of Blood, and the Obligation which lies on the Father in Conſcience to provide for his Son, are Predominant; and muſt over-rule all Manner of Implications. And herein the Law of Truſts does (as it ought to do) agree with the *Law of Uſes before the Statute* of *H.* 8. and therefore, if, before that Statute, the Father had made a Feoffment to a Stranger without any Conſideration, the Law raiſed an Uſe without any Implication to himſelf; but if he made a Feoffment to *his Son*, no Uſe did ariſe to the Father by Implication, becauſe the Blood, which is a ſufficient Conſideration, did fix and ſettle the Eſtate in the Son. It is true, where the *Son is married in the Life-time of his Father, and by him fully advanced*, and in a Manner emancipated, there a Purchaſe by the Father, and in the Name of his Son, may be a Truſt for the Father, as much as if it had been in the Name of a Stranger, becauſe in that Caſe Finch 338. Grey v. Grey.

all

all Presumptions or Obligations of Advancements cease. *But where* the Son is not *advanced*, or but advanced or emancipated *in Part*, in such Case there is no room for any Construction of a Trust by Implication; and without clear Proofs to the contrary, it ought to be taken as an Advancement of the Son.

2 Ch. Cas. 231. Elliot v. Elliot.

4. So where the Father purchases in the Name of the Son, it has frequently been decreed an Advancement, and not a Trust, though the Father takes the Profits and keeps Possession; and though the Father, after such Purchase, declares the Trust, yet it is not good, unless the Trust be declared before or at the Time of the Purchase; and so the Lord Chancellor agreed.

1 P. Wms.'s Rep. 111, 112. Lamplugh v. Lamplugh. It was farther said in this Case, that the Father's taking the Profits, must be intended to have been done by him as Guardian to the Son.

5. Likewise where a Father purchased *in a younger Son's Name, and a Nephew*'s Lands of Inheritance; and also purchased a Term for Years (of which he himself had the Inheritance) in the same Son's and the Father's Mother's Name; though the whole Purchase-Money was mentioned to be paid by the Father, and though he *took the Profits* during his Life, and died leaving the Son about eight Years old; and *though a Reversion, expectant on his Mother's Death, was settled upon him*, yet, the Trustees disclaiming any Interest in the Estate, Lord Chancellor held the Son to be *unprovided for, notwithstanding such Reversion* after his Mother's Death, and that he might starve in the mean Time; and that the *Trustees* having *disclaimed*, made it all one as if the Purchase had been in the Son's Name only.

6. But it seems it had been otherwise, if the Father had took *the Profits after the Child's coming of Age*, and when of Discretion to claim his Right—

P. Wms.'s Rep. 607, 608. Loyd v. Read.

7. *As* where *A.* a *Grandmother, purchases an Annuity in the* 14*l. per Cent. Annuities for Lives*, for 100*l. in the Name of* E. *her Grand-child.* The Father of *E.* gave *A.* the Grand-mother a Bond to repay her the 100*l.* in case *E.* should die in the Grand-mother's Life. *A.* kept the Tally, and received the Annuity during her Life, and disposed of it by her Will to *F.* another Grand-child. Decreed by the Chancellor, that the receiving the Income, and keeping the Tally, and *no Claim having ever been made by E.* shewed that *E.* was but a Trustee for *A.* and that the Bond given by the Father, in which no mention was made of a Trust, did not make it to be so.

Finch 373. Hodgkinson v. Moor.

8. Likewise where a Father purchases the Reversion and Inheritance, in his own Name, of Lands of which a Lease for three Lives was then in Being, and afterwards purchases the Lease for three Lives in his Son's Name, it is decreed a Trust, and not an Advancement.

Chan. Cas. 28. Scroope v. Scroope. It was said in this Case, that it was antiently the way to join the Son in a Purchase, to avoid Wardship.

9. But where a Purchase is made by a Father in his own and his Son's Name, it shall *prima facie* be intended an Advancement for the Son, and not presumed a Trust, unless declared so.

(E) What Acts of a Truſtee ſhall be a Breach of Truſt, &c. or ſhall be deemed to alter or vary the Nature of it.

1. TRUSTEES are ſo far regarded and ſupported in Equity, that regularly no Act of the Truſtee ſhall prejudice the *Ceſtui que Truſt*, for though a Purchaſer for a valuable Conſideration, without Notice, ſhall in no Caſe have his Title impeached in Equity; yet the Truſtee muſt eſpecially in Equity, make good the Truſt; and my Lord *Hobart* is of Opinion, that an Action lies againſt him at Common Law; but if one purchaſes with Notice, then he becomes the Truſtee himſelf, and ſhall be accountable for every Act of his, as the Truſtee was, and if either become inſolvent, the *Ceſtui que Truſt* has his Remedy againſt the other. The Truſtee of a Legacy dying before the Legacy is paid, ſhall not prejudice the Legatee; ſo if a Truſtee of Land die without Heir, though the Lord by Eſcheat will have the Land at Law, yet it will be ſubject to the Truſt in Equity. 1 Abr. Eq. Caſ. 384. Pre. Ch. 200. Eacles v. England.

2. When all the Remainders are *veſted Remainders* in Tail, the *Truſtees may join in making a Tenant to the Præcipe*, in order to the ſuffering a common Recovery. *But if any* Remainder *is in Contingency*, the Truſtees appointed to preſerve contingent Remainders ought not to join in ſuffering a Recovery to bar any ſuch Remainder; *As* where the Remainder was *to the Uſe of the Body of* A. *(ſtill living)* and A. *had Iſſue* C. *a Son, and* D. *a Daughter*, and the Truſtees join with *C.* in a Bargain and Sale inrolled, for making a Tenant to the *Præcipe* to ſuffer a common Recovery, which is ſuffered accordingly, and *C.* dies, leaving an Infant Son. Now if the Son ſhould die without Iſſue, in the Life of *A.* in ſuch Caſe *D.* would be Heir of *A.*'s Body. This would be a Breach of Truſt, and in Caſe of a Purchaſer having Notice, his Title would not be good. 2 P. Will. Rep. 201. It was ſo ſaid by Talbot Solicitor General in the Caſe of Marlow v. Smith.

3. Where *a Settlement on Marriage of* A. *with* M. *was made by* J. S. *to* the Uſe *of* A. *for* 99 *Years*; Remainder *to* E. *and* F. *Truſtees for* 99 *Years*; Remainder *to Truſtees during the Life of* A. *to ſupport contingent Remainders*; Remainder *to* M. *for Life*; Remainder *to the firſt*, &c. *Son of the Marriage*; Remainder *to the Heirs of the Body of* A. Remainder *to the right Heirs of* A. there being *no Iſſue* of the Marriage, and the Remainder in Fee being contingent, in regard the Limitation to *A.* was for Years only, and the Eſtate not moving from *A.* (for if ſo, the Remainder limited to *A.* had been the old Reverſion) the Truſtees joined to deſtroy this contingent Remainder. On a Bill brought by a remote Relation, the Court refuſed to puniſh the Truſtees, as *diſtinguiſhing* between a *voluntary Settlement* and one made on a *valuable Conſideration:* And the Maſter of the Rolls ſaid, that *if a Son had been afterwards born, it would have been a Breach of Truſt*; but this Remainder to the right Heirs of *A.* being a *remote Limitation, and not within the Conſideration of the Settlement*, Equity would not puniſh it as a Breach of Truſt. 1 P. Will. Rep. 358, 359. Sir Thomas Tippen's Caſe.

4. So where *a Remainder in Tail being veſted in the firſt Son, the Truſtees joined* with him *in ſuffering a common Recovery*; it was held no Breach of Truſt, though *againſt the Conſent of the Father*; for when ſuch Remainder was veſted in one of full Age, a ſubſequent Remainder was not to be regarded; neither was it Aſſets in Law or Equity. Cited *per* Mr. *Vernon*, and ſo held ſince the Caſe of Sir *Thomas Tippen ſupra*. 1 P. Will. Rep 537. Winnington v. Foley.

5. But

2 P. Will. Rep. 610, 617. Manſell *v.* Manſell.— Caſes in Eq. Temp. Talbot 252. S. C. In this Caſe it was ſaid that where an Eſtate is limited *to* A. *for Life*, Remainder *to his firſt*, &c. *Sons in Tail*, though it be a plain Wrong and Tort in him to do any Act which will deſtroy thoſe contingent Remainders before the Birth of a Son, notwithſtanding his *legal* Power of doing ſo; yet as in this Caſe there is no Truſtee, there can be no Truſt, nor conſequently any Breach of Truſt, and therefore *this* Court can have no Conuſance of ſuch a Caſe, nor Handle for Relief, the Matter being left purely to the *Common* Law. But to prevent this Inconvenience, has the Remedy of appointing Truſtees been invented, on Purpoſe to *diſable the Tenant for Life* from doing ſuch Injury to his Iſſue, which is not a very old Invention. *Per* Ld. Ch. King, aſſiſted *ut ſupra*. 2. P. Wms. 612, 613.

5. But where *J. S.* ſeized in Fee of Lands, deviſed the ſame to *A.* and *B.* and their Heirs, to the Uſe of *D.* his Siſter for Life, Remainder to *A.* and *B.* and their Heirs during the Life of *D.* in Truſt to preſerve contingent Remainders, Remainder to the Uſe of the firſt, &c. Sons of *D.* in Tail Male ſucceſſively, Remainder to the Uſe of *E. M.* in Fee, Teſtator dying without Iſſue *D.* entered, and married *C.* afterwards *C.* and *D.* his Wife, and *E. M.* the Remainder-Man in Fee, join in a Feoffment to (new) Truſtees to the Uſe of *C.* and his Heirs, and covenant to levy a Fine to the (new) Truſtees to the ſame Uſes; (and a Fine, as it ſeems, though not ſtated in the Caſe) was accordingly levied. Afterwards *A* and *B.* (the Truſtees for preſerving, &c. in the Will) by Leaſe and Releaſe convey the Lands to *C.* in Fee, *D.* being then *enſient* of a Son, who was ſoon afterwards born, and named *G.* and *D.* had afterwards ſeveral other Children; ſubſequent to which *C.* the Father deviſed all his Lands in general Words to the ſaid *G.* for Life, Remainder to his firſt, &c. Sons in Tail Male ſucceſſively; Remainder to his (*C.*) the Teſtator's ſecond Son by *D.* for Life, Remainder to his firſt, &c. Sons in Tail Mail ſucceſſively, and died, leaving ſeveral Sons; *D.* alſo died. On a Bill by *G.* it was reſolved by *King* C. aſſiſted by Lord Chief Juſtice *Raymond* and Chief Baron *Reynolds*, that the joining of the Truſtees to deſtroy the Contingent Remainders was a plain Breach of Truſt, and that though this had not been before judicially determined, yet it ſeemed to the Court in common Senſe, Reaſon and Juſtice, to be capable of no other Conſtruction: And all Parties were decreed to join in making ſuch an Eſtate to *G.* as he would have been intitled to under the Will of *J. S.* if theſe contingent Remainders had not been deſtroyed, *i. e.* an Eſtate in Tail Male, &c.

1 Vern. 149. Bovey *v.* Smith.

6. If *A.* ſeized in Fee, in Truſt for *B.* for full Conſideration conveys to *C.* who has Notice of the Truſt; and afterwards *C.* to ſtrengthen his own Eſtate, levies a Fine, *B.* the *Ceſtui que Truſt* is not bound to enter within five Years; for *C.* having purchaſed with Notice, notwithſtanding any Conſideration paid by him, is but a Truſtee for *B.* and ſo the Eſtate not being diſplaced, the Fine cannot bar.

1 Vern. 484. Walley *v.* Walley.

7. So if an Executor, in Truſt for an Infant Reſiduary Legatee, renews a Leaſe, Part of the Teſtator's perſonal Eſtate, in his own Name, and firſt mortgages it, and then aſſigns the Equity of Redemption to a Truſtee, to ſell for Payment of his own Debts, and his Truſtee ſells to one who has Notice of the Infant's Title, the Purchaſe will be ſet aſide.

Furlam *v.* Sanders in Chanc. Mich. 28 G 2. MS. Rep. And ſee 3. P. Wms. 100. Witter *v.* Witter.

8. A bare Truſtee cannot alter the Nature of the Truſt by turning Land into Money, or Money into Land, ſo as to make it veſt in different Perſons, by his Act, than it would otherwiſe have done.

(F) What

(F) What Acts of the Truſtee, jointly with Ceſtui que Truſt, or by Ceſtui que Truſt only, ſhall defeat the Truſt, or deſtroy contingent Remainders.

1. THOUGH at Law, by the Truſtees, concurring in any Act to prevent the riſing of the contingent Remainder, it was formerly held that it was for ever deſtroyed and gone; yet *Cowper* C. held this to be an exploded Opinion now in Chancery, as to Perſons who are to come in and be conſidered as Purchaſers under the Marriage Settlement and Portion. But as for voluntary Remainders, (as a Remainder to the Right Heirs of the Body of the Huſband, and after to his right Heirs, neither of which can be ſaid to be within the Purchaſe of the Marriage Portion, but only the firſt and other Sons, *&c.* of the Marriage) this Court will not aſſiſt them to ſupport the Remainder ſo deſtroyed. Gil Eq. R. 34. Tipping v. Piggot.

2. If Truſtees in a Settlement, to ſupport contingent Remainders, join with the Tenant for Life in any Conveyance, to deſtroy the contingent Remainders before they come in *Eſſe*; this is a plain Breach of Truſt; and whoever claims under ſuch a Conveyance, having Notice of the Truſt, or by a voluntary Settlement, ſhall be liable to make good the Eſtate. 2 Salk. 680. Pye v. George. 1 P. Will. 128. S. C.

But if a Truſtee join with a *Ceſtui que Truſt* in Tail in any Conveyance to bar the Intail, this is no Breach of Truſt; for it is no more than what he may be compelled to, though the *Ceſtui que Truſt* himſelf might have barred ſuch Intail without his joining; and that not only by Fine or Recovery, but likewiſe by Feoffment, Bargain or Sale, Deviſe or Surrender, (if the Intail be of a Copyhold, and there is no particular Cuſtom which requires a common Recovery); for ſuch Intail is not within the Statute *de Donis*, but remains as at Common Law; and being a Truſt is governable only by the Rules of Equity, and not by the Niceties of the Law, and this ſeems to be ſupported not only by the latter, but by the far greater Number of Authorities, and in Caſes wherein the very Point itſelf was debated, though there are *obiter* Sayings and Opinions, which have made ſome Diſtinctions, and others which have flatly contradicted it. Vide 1 Chan. Ca. 49, 213. 2 Chan. Ca. 78, 64. 1 Vern. 13, 440. 2 Vern. 133, 583, 702.

3. But if a Settlement on a Marriage-Treaty be made on the Huſband for ninety-nine Years, if he live ſo long, Remainder to Truſtees to preſerve contingent Remainders; Remainder to the Heirs of the Body of the Huſband by the Wife, Remainder to the Heirs of the Huſband; and there is Iſſue two Sons and a Daughter; and the Wife being dead, the Huſband and Truſtees join with the eldeſt Son in a Fine or Feoffment to *J. S.* this is a good Bar of the Truſt-Eſtate, and the Truſtees joining is no Breach of Truſt, for they were Truſtees purely for the Tenant in Tail, and to preſerve his Eſtate, and not to ſtand in Oppoſition to him for the Sake of thoſe who were to come after him. 2 Vern. 754. Elie v. Oſborne. And ſee 1 P Will. 387. S. C. by the Name of Elſe v. Oſborne.

4. Truſtees to preſerve contingent Remainders, if Tenant for Life or Years commit Waſte, may reſtrain them by Injunction. If there is only an Eſtate for Years, Remainder to firſt and other Sons, Remainder in Tail and no Truſtees to preſerve, *&c.* the Remainder Man in Tail before Iſſue born, would have an immediate Freehold; and if it had been Tenant for Life and no Truſtees, he might before Iſſue born have ſurrendered to the Remainder-Man, or barred the whole Eſtate. The Riſe of theſe Truſtees was from *Chudley* and *Archer*'s Caſe in *Co. Rep.* and Remainders in Truſtees and their Heirs during the Life of another Perſon has been held good, as that Perſon may commit a Forfeiture. Where there is Tenant for Years, with Remainder to Truſtees during his Life to preſerve contingent Remainders, the Freehold is in the Truſtees, and the Poſſeſſion of Tenant for Years, is in Law the Poſſeſſion of the Owner of the Freehold. It is agreeable to Juſtice in Support of Right to conſtrue Garth v. Cotton, Mſs. Rep.

Truſts

Truſts in the moſt liberal Manner. Truſtees are the Creatures of this Court, and under the Correction of it intended to preſerve the Inheritance entire. Theſe Truſts are generally declared, with Power to make Entry and bring *Actions*, &c. as the Law requires, which includes Equity too: And Truſtees may bring a Bill in Equity to ſtay Waſte, before the contingent Remainder comes in *Eſſe*. Truſtees are liable in Equity to make Satisfaction for Breach of Truſt, and a voluntary Alienee with Notice, will be decreed to reſtore the Eſtate.

(G) In what Caſes Equity will decree Truſtees to join in a Recovery, &c. with Ceſtui que Truſt.

1 P. Will. Rep. 358. Baſſet *v.* Clapham.

1. IN ſome Caſes, Truſtees have been decreed to join for the Benefit of Creditors—Thus, where *J. S.* after Marriage made a voluntary Settlement of his Lands *to himſelf for Life*, Remainder *to Truſtees to ſupport*, &c. Remainder *to his firſt*, &c. *Son in Tail ſucceſſively*, Remainder *to himſelf in Fee*; and contracting Debt, he afterwards makes a Conveyance of his Eſtate to other Truſtees for Payment of theſe Debts. The Creditors bring a Bill, and *(inter alia)* inſiſt that the Truſtees in the firſt Settlement ſhould join in the Sale to deſtroy the contingent Remainders. And his *Honour*, upon ſhewing a precedent of a like Decree, decreed that the Truſtees ſhould join to deſtroy the contingent Remainders, and be indemnified, it being at the Suit of Creditors, and for raiſing of Money for the Payment of Debts.

Note. By the 7 Ann. c. 19. Infants being Truſtees or Mortgagees may be compelled to make Conveyances by Order of the Court of Chancery.

It is a general Rule in Equity, that where a real or perſonal Eſtate is charged with Payment of Debts generally, and veſted in Truſtees to ſell, the Purchaſer from ſuch Truſtees is not anſwerable for any Miſapplication of the Money; and needs not ſee that the Debts are paid. But if it is made chargeable with particular Debts, it is otherwiſe; or if there be any Colluſion between the Executor or Truſtee and Purchaſer, the Purchaſe would be infected with the Fraud or Colluſion. *Per* Lord Chancellor Hardwicke, Mich. 27 Geo. 2. Anon. Mſs. Rep. And ſee 1 Vern. 260. Dunch *v.* Kent. And Id. 303. Spalding *v.* Shalmer, S. P.

2. So likewiſe a Court of Equity will decree Truſtees to join for the apparent Benefit of the Family.

1 P. Will. 536. Winnington *v.* Foley.

3. In a Marriage Settlement the Huſband was made Tenant for ninety-nine Years, if he ſhould ſo long live, Remainder to Truſtees during his Life, Remainder to the firſt, &c. Son of that Marriage in Tail Male ſucceſſively, Remainder to the firſt, &c. Son of any other Marriage, Remainder over. A Son is born and of Age, and the Wife is dead. The Truſt for preſerving contingent Remainders deſcends to an Infant; if for the Benefit of the Family, Equity will decree the Infant Truſtee to join in a Recovery, in order to make a new Marriage Settlement.

2 Vern. 303. Platt *v.* Sprigg.

4. Likewiſe where *A.* having mortgaged his Lands, and alſo confeſſed a Judgment, and afterwards, on a Marriage-Treaty, ſettled the Lands thus incumbered to the Uſe of himſelf for Life, Remainder to the Truſtees to ſupport contingent Remainders; Remainder to his Wife for Life; Remainder to his firſt and other Sons in Tail; Remainder to his own right Heirs, and having no Iſſue, articled to ſell the Lands to *J. S.* who brought a Bill for a ſpecifick Performance of the Agreement, and ſuggeſted that the Truſtees refuſed to join, and that the Mortgagee threatened to enter; and it was decreed, that the Truſtees ſhould join and be indemnified, the Eſtate being of an Equity of Redemption only; and there

there being no Iſſue, (though the Huſband and Wife were married ſix Years) and the Wife on her Examination in Court conſenting freely thereunto. But *note*; thoſe Settlements can rarely be broke through but by an Act of Parliament.

5. Where on Marriage, Lands are limited to the Uſe of *A.* for ninety-nine Years, if he ſhould live ſo long, Remainder to *B.* and other Truſtees (of which *B.* was the Survivor) and their Heirs during *A*'s Life, to preſerve, *&c.* Remainder to *A.*'s Wife for Life; Remainder to the firſt, *&c.* Sons of the Marriage in Tail Male ſucceſſively, Remainder over. The Wife dies, leaving Iſſue of the Marriage only two Sons, *C.* and *D.* *A.* having mortgaged the Premiſſes, he and his Son *C.* (*C.* being then of Age) covenant to ſuffer a Recovery, and to procure *B.* the ſurviving Truſtee to join therein, but *B.* refuſing to join in making a Tenant to the *Præcipe*, the Mortgagee prayed a ſpecifick Performance of the Covenant, and that *B.* might join in ſuffering the Recovery; *B.* by Anſwer ſubmits to the Court, but *D.* the younger Son refuſing to Conſent, Lord Chan. *King* ſaid, that then he would not decree the Truſtee to join, for that he would not take away any Man's Right. So diſmiſſed the Bill as to *B.* and *D.* with Coſts, but decreed *A.* and *C.* ſpecifically to perform the Covenant. 2 P. Will. Rep. 379. Townſend v. Lawton.

6. Likewiſe where *J. S.* by a Marriage Settlement was *Tenant for* 99 *Years if he* ſhould ſo long live, with Remainder *to Truſtees and their Heirs during his Life*, to ſupport contingent Remainders, with Remainder *to his firſt and every other Son ſucceſſively in Tail Male*, Remainder *to Truſtees for* 500 *Years* in Truſt *to raiſe Portions for Daughters, if* there were *no Iſſue Male*, or that ſuch Iſſue Male died without Iſſue before 21; *J. S.* had Iſſue a Son, and being of Age and about to marry, he and his Father bring a Bill to have the Truſtees join in making an Eſtate, in order to ſuffer a common Recovery, that he might be enabled to make a Settlement on his Marriage; and it was urged, that the Truſtees were only Truſtees for the Son, and ought to execute Eſtates as he ſhould direct, he having the Inheritance in him, and that the End of the Truſts was to hinder the Father from defeating the Son of the Eſtate. On the other Side, it was urged, that theſe Truſtees were not only Truſtees for the eldeſt Son, but were deſigned as a Guard to the whole Settlement, that the Mother being living there might be other Children, and for the Truſtees to join would be a Breach of Truſt, and if there ſhould be a Daughter, they would by this Means be entirely ſtripped of their Portions; and though the Term for raiſing them was unſkilfully drawn, in putting it behind the Eſtate-Tail to the Sons, yet this Court had ſet it ſometimes before thoſe Eſtates. There being a Daughter in this Caſe, my Lord *Harcourt* directed, upon *giving Security for the Daughter's Portion, that* the Truſtees ſhould join in a Recovery. 1 Abr. Equ. Caſes 386. Frewin v. Charleton.

7. *Ceſtui que Truſt* in Tail under a Deviſe of Lands charged with Annuities, brings a Bill againſt the Truſtees, to the Intent they ſhould join in a Recovery. This is not proper, but it is proper to pray, that the Truſtees may convey the Premiſſes to *Ceſtui que Truſt* in Tail, who may then ſuffer a Recovery; though if the Truſtees are alſo Truſtees for an Annuity ſubſiſting, they are not compellable to part with the legal Eſtate out of them to the *Ceſtui que Truſt* in Tail. 2 P. Will. Rep. 134. Carteret v. Carteret.

Note, A Deviſe to Truſtees, and their Heirs in Truſt to ſell, is deemed equitable Aſſets, in order to make an equal Diſtribution among all the Creditors. Howard v. Hall, Hill. 1744. MSS. Rep.

(H) When

(H) When a Truſt is to be executed, what Eſtate or Intereſt is to be conveyed, and to whom.

1 Abr. Eq. Caſ. 395.

1. IT is now conſtantly held in Chancery, that if Lands are veſted in Truſtees to the Uſe of one and the Heirs of his Body, with Remainder over, that the Truſtees are not to convey a Fee, but an Eſtate-Tail, though he will have Power to bar the Intail, when the Conveyance is made to him, and it would avoid Circuity; ſo if a Sum of Money be appointed to be laid out in a Purchaſe; and the Lands to be ſettled in Tail, the Purchaſe and Settlement ſhall be made accordingly, *and not the Money paid to the Party*; for the Remainder-Man has a Chance for the Eſtate, in Caſe the Tenant in Tail in Poſſeſſion die without Iſſue before any Recovery ſuffered, which he may omit through Ignorance or Forgetfulneſs, or he may be prevented by Death before he has compleated it.

1 Abr. Eq. Caſ. 392.

2. So where an Eſtate is limited to *A.* and *B.* in Truſt for *C.* and the Heirs of his Body, *Proviſo*, that if he die without Iſſue, then in Truſt for *D.* for Life, with Remainder over, and *C.* brought his Bill to have the Truſtees make a Conveyance of the legal Eſtate to him, and that it might be to him in Fee, to prevent his ſuffering a Recovery, the Truſtees by Anſwer ſubmitted to the Court; but the other Remainder-Men, who were Defendants, oppoſed the executing any legal Eſtate to *C.* becauſe he would then ſuffer a Recovery, and defeat the Intent of the Donor, which was, that it ſhould be preſerved for them, in Caſe *C.* had no Iſſue; they alledged, that *C.* had married improvidently and was extravagant, and would ſpend the Eſtate, and cited the Caſe at the End of *Twine's* Caſe, 3 *Co.* where, if an improvident Man makes a voluntary Settlement to put it out of his Power to ſpend his Eſtate, this Settlement ſhall be ſupported even at Law; and therefore a Court of Equity will never help an extravagant Man to deſtroy ſuch a Settlement as this; and that in the Caſe of Sir *Fra. Garrard*, the Lord Chan. *Jefferies* had refuſed to decree the Truſtees for Sir *Francis* and the Heirs of his Body, with a Remainder to a Charity, to convey the legal Eſtate, ſo as to enable him to ſuffer a Recovery. On the other Side, it was ſaid, there was no Reaſon my Truſtee ſhould hold my Eſtate, whether I will, or no; and that if a Court of Equity did not decree a Conveyance in ſuch Caſe, it would be eſtabliſhing a Perpetuity; and that the conſtant Courſe of this Court is, that when Money is given to be laid out in a Purchaſe to be ſettled in Tail, with Remainders over, the Court will decree the Money to him that was to be Tenant in Tail, if he deſire it, to prevent Circuity; but the Maſter of the Rolls decreed the Truſtees to execute a Conveyance to *C.* in Tail, but would not decree the Conveyance to be in Fee, though preſſed to it; and he ſaid there may be many Reaſons why a Court of Equity would not decree a Conveyance at all, in ſuch a Caſe, ſometimes for a politick Reaſon, as if it were to enable a Nobleman to ſuffer a Recovery, and leave the *Honour* bare, without Eſtate; or if the Party were a notorious Spendthrift, or when the Eſtate-Tail was only by Implication, as he ſaid he took it in Sir *Fra. Garrard's* Caſe; and he thought it would be an ungodly Thing in the Truſtees to execute a Conveyance of the legal Eſtate in ſuch Caſe as this at the Bar, without a Decree of the Court. *Hill.* 1701. *Saunders* and *Nevil. Note*; Though the Court would not decree a Conveyance in Sir *Fra. Garrard's* Caſe, yet he ſuffered a Recovery as *Ceſtui que Truſt* in Tail, which was held good, and the Eſtate enjoyed under it diſcharged of the Charity.

Where

3. Where a Queſtion ariſes how a Truſt ought to be executed by a Conveyance, there is *no better Rule than* to obſerve and follow *what has been done at Law, in the executing Conditions* that are Matters *executory*, and to be performed ſo far as the Caſe will admit of. *Per Cowper* C. 2 Vern. 736. pl. 644. Newcomen v. Barkham.

4. If *Tenant for Life and Remainder-Man in Tail join* in a Bill againſt Truſtee, the Court will decree the *Truſtee to convey to them*, or to whom they appoint, and poſſibly he may pay Coſts for refuſing to convey and putting his *Ceſtui que Truſt* to the Charge of an unneceſſary Suit. 2 Vern. 346. Bowater v. Elly.

5. *A.* deviſed Lands to a Company in Truſt to convey to *B.* for Life, Remainder to his firſt, *&c.* Sons for their Lives ſucceſſively, and ſo to their Iſſue Male for their Lives only, Remainder over. *Per Cur:* An Attempt to make a perpetual Succeſſion of Eſtates for Life is vain, and an *impracticable Perpetuity*. However the Truſtees *muſt make as ſtrict a Settlement as may be*, ſo that the Perſons in Being are to be made only Tenants for Life; but where the Limitation was to be to the Son not in Being, there he muſt be made Tenant in Tail Male. 2 Vern. 737. pl. 646. Humberſton v. Humberſton.

6. A Huſband, as Adminiſtrator to his Wife, obtained a Decree againſt the Truſtees to raiſe her Portion; but he being a younger Brother, having made no Settlement on her, and having a Son by her, the Money was decreed to be raiſed, and put out for his Benefit for Life, then to the Son for Life, and if he leaves Iſſue, and the Father ſurvives, he to have it. 1 Abr. Eq. Caſ. 392. Whytham v. Cawthorn.

7. Upon a Marriage, Articles were entered into, whereby it was agreed, that the Wife's Portion ſhould be laid out in the purchaſing of Lands, which ſhould be ſettled on the Huſband and Wife for their Lives, and the Life of the longeſt Liver of them, and after to the Heirs of the Body of the Wife, by the Huſband to be begotten; yet the Maſter of the Rolls decreed the Settlement to be to the firſt and other Sons, *&c.* ſo as the Huſband and Wife might not have Power to bar the Iſſue. 1 Abr. Eq. Caſ. 392. Jones v. Langhton.

8. So where on a Treaty of Marriage between the Defendant and the Plaintiff *Joanna*, the Defendant entered into a Bond to the Plaintiff *Joſeph*, Father of the Plaintiff *Joanna*, with Condition to ſurrender certain Copyhold Lands to the Uſe of himſelf for Life, Remainder to the Plaintiff *Joanna* for Life, Remainder to the Heirs of their two Bodies to be begotten, with Remainder to the Heirs of the Huſband; the Marriage took Effect, and a Bill was brought againſt the Huſband to compel a Surrender purſuant to the Intent of this Bond; and the Huſband, making Default at the Hearing, was decreed to ſurrender to the Uſe of himſelf for Life, Remainder to the Uſe of his Wife for Life, Remainder to the Uſe of their firſt and other Sons in Tail general ſucceſſively, with a Remainder to the Daughters of their two Bodies to be begotten in Tail general; and in the mean Time, till ſuch Surrender was made, the Court declared that the Copyhold Land ſhould be held and enjoyed according to theſe Uſes. 1 *Abr. Eq. Caſ.* 393. *Nandich* v. *Wilkes*. Gilb. Eq. Rep. 114. S. C. under the Name of Nandike v. Wilkes *in totidem verbis*. Note; This Decree was on a Bond, where though the Penalty ſeems to have been the only Sanction intended for ſecuring the Performance of the Condition; yet a ſpecifick Execution was decreed, and in ſuch a Manner too, as effectually to ſecure the Iſſue from being defeated by making them Purchaſers. But Note, in *Gilbert*, there is no Mention in the Decree of the Remainder to the Wife for Life.

9. *W. B.* deviſed 300*l.* to her Daughter *M.* to be laid out by her Executrix in Lands, and ſettled to the only Uſe of her Daughter *M.* and her Children; and if ſhe died without Iſſue the Lands to be equally divided between her Brothers and Siſters then living; the Plaintiff married *M.* the Legatee, and had Iſſue by her, but ſhe and her Child being both dead, and the Money not laid out in Land, the Bill was, that the Plaintiff might either have the Money laid out in Lands, and ſettled on him for Life, as being Tenant by Curteſy, or in lieu of the Profits of the Lands might have the Intereſt of the Money during his Life; and it was 2 Vern. 536. Sweetapple v. Bindon.

held by the Court, that if it had been an immediate Deviſe of Land, *M.* the Daughter would have been by the Words in the Will Tenant in Tail, and conſequently the Huſband would have been Tenant by the Curteſy; and in Caſe of a voluntary Deviſe, the Court muſt take it as they found it; although upon the like Words in Marriage-Articles it might be otherwiſe, where it appeared the Eſtate was intended to be preſerved for the Benefit of the Iſſue; and therefore decreed the Money to be conſidered as Lands, and the Plaintiff to have the Intereſt or Proceed thereof for his Life, as Tenant by the Curteſy.

Starkey *v.* Starkey, in Exch. Trin. 19 Geo. 2. MSS. Rep.

10. Where a Surrender was made of an Eſtate of the Nature of *Burrough Engliſh*, to the Uſe of Truſtees, in Truſt after Payment of an Annuity and ſome particular Debts, to ſurrender the ſame to the Uſe of the Heirs of the Body of the Huſband and Wife. The Huſband and Wife had two Sons, and when the Annuity, *&c.* were at an End, they each of them claimed the Surrender in their Favour. The eldeſt Son as Heir of the Body by the Common Law of *England*, and the younger as Heir by the Cuſtom of *Burrough Engliſh* of which Nature this Eſtate was. But as this was a Truſt merely executory, the Court directed a Surrender to be made to the eldeſt Son, as Heir General by the Common Law.

(I) Truſtee in what Caſes favoured, and in what Caſes decreed to account.

2 P. Will. Rep. 455. Balſh *v.* Hyham.

1. IT is a Rule that the *Ceſtui que Truſt* ought to ſave the Truſtee harmleſs, as to all Damages relating to the Truſt, and it is within the Reaſon of that Rule, that where the Truſtee has honeſtly and fairly, without any Poſſibility of being a Gainer, laid down Money, by which the *Ceſtui que Truſt* is diſcharged from being liable for a greater Sum lent, or from a plain and great Hazard of being ſo, that the Truſtee ought to be paid.

1 Vern. 144. Palmer *v.* Jones.

2. A Truſtee ſhall not be charged with imaginary Values, but only as Bailiff, though very ſupine Negligence might indeed, in ſome Caſes, charge a Truſtee with more than he had received; but the Proof thereof muſt be very ſtrong; and it is a Hardſhip on him, that he is allowed nothing for his Pains. *It has been ſaid likewiſe, that it was a hard Rule to charge a Truſtee with what he had made, or might have made, without his wilful Default; but the Reaſon was, becauſe the Court could never yet find where elſe to fix the Meaſure.*

2 Chan. Ca. 2. Morley *v.* Morley.

3. The Defendant was Truſtee to the Plaintiff an Infant, and received for him 40*l.* in Gold; the Truſtee was robbed by his own Servant, who lived with him in the Houſe, of 200*l* together with this 40*l.* which laſt Sum was only proved by the Defendant's own Oath; yet my Lord Chancellor allowed it on Account, for he was but to keep it as his own.

2 Chan. Ca. 138. Amand. *v.* Bradburne.

4. If a Truſtee ſued for the Truſt-Eſtate, obtains a Decree with Coſts of Courſe, and the Coſts taxed him are ſhort of his real Coſts; and the *Ceſtui que Truſt* exhibits a Bill for an Account of the Truſt-Eſtate; the Truſtee, in his Diſburſements, ſhall be allowed the full and neceſſary Coſts, and ſhall not be concluded by the Coſts taxed.

1 Vern. 28. Purefoy *v.* Purefoy.

5. If two Eſtates are conveyed to a Truſtee for Payment of ſeveral and diſtinct Debts, and the Heir at Law brings a Bill for an Account, and afterwards prays that the Bill may be diſmiſſed as to one of the Eſtates, yet an Account ſhall be taken of both Eſtates.

2 Vern. 137. Franklin *v.* Green.

6. *A.* deviſed 100*l.* a-piece to four Children, payable at 21, or Marriage, with Maintenance not exceeding the Intereſt in the mean Time; *B.* was appointed

appointed Truſtee of a Truſt-Eſtate, to raiſe and pay the Legacies as aforeſaid; and he paid 20 *l.* in placing out one of the Children Apprentice, who died before his Age of 21 Years; and the Court held that the 20 *l.* was well laid out, and that the Truſtee ſhould be allowed it; though the 100 *l.* was limited over, in Caſe of Death before 21 or Marriage.

7. But if a Truſtee for the Payment of Children's Portions pays one of them his full Share, and the Truſt-Eſtate decays, he ſhall not be allowed ſuch Payment; and it was urged, that though the Appointment was to pay the eldeſt in the firſt Place, *&c.* yet it would not be good, as it did not denote Preference in the Quantity of the Sum to be paid; but my Lord Keeper was of another Opinion as to this Point; it ſeems clearly agreed, however, that a ſpecifick Legatee may be paid in the firſt Place. 2 Chan. Caſ. 132. Tilſly *v.* Throckmorton.

8. If one deviſe to Truſtees, and by an expreſs Clauſe gives them Power to appoint Agents to manage the Land, and they appoint one then ſolvent, and good, though after he proves inſolvent, they ſhall not anſwer for him; but it is otherwiſe if he were not ſolvent at the Time of Nomination. But if there were no ſuch Direction or Power in the Will, the Truſtees are bound to anſwer for their Agents at all Events. *Per* Lord Keeper *Wright.* 12 Mod. 560; Sutton the Marſhal's Caſe.

9. If a Truſtee impowered to put Money to Intereſt, lets the Money lie by him, he ſhall be accountable for Intereſt. *Per Harcourt* Lord Keeper. Caſ. in Law. & Eq. Temp. Ld. Macclesfield 21. Brown *v.* Litton.

10. Likewiſe although an Executor or Truſtee is not impowered or directed to place out Money at Intereſt; yet if he makes Intereſt, he ſhall be accountable for it. Decreed accordingly. 2 Vern. 548; Lee *v.* Lee.

11. But afterwards a Difference was taken by Lord *Macclesfield, viz.* that if an Executor or Truſtee of Money places it out in the Funds, or on other Security, whereby he gains conſiderably, that he ſhall have the whole Benefit thereof to himſelf, in reſpect of the Hazard he runs of being a conſiderable Loſer thereby, which he muſt have born; but if ſuch Truſtee or Executor were an inſolvent Perſon at the Time of placing out ſuch Truſt-Money, there the *Ceſtui que Truſt* ſhall have the whole Benefit gained thereby; as he only could have born the Loſs thereof, if any had happened; the Truſtee or Executor, by Reaſon of his Inſolvency, being incapable thereof, and conſequently running no Hazard at all. 1 Abr. Eq. Caſ. 398. Bromfield *v.* Wytherly.

12. If a Truſtee is directed to place out Money on the beſt Security that can be got, with the Conſent of Huſband and Wife; and he puts it into a Banker's Hand, and takes his Note for it, and be becomes a Bankrupt, by which the Loſs happens; the Truſtee ſhall be decreed to pay the Money out of his own Pocket, though no Fraud appear, and though the Conſent of Huſband and Wife be had to it. Rider *v.* Bickerſton. MS. Rep.

(K) How far Truſtees are anſwerable for each other.

1. EACH Truſtee ſhall be charged for no more than what he actually received; but where they join in Receipts, there they ſhall be all charged; *per North* K. *Vern.* 301. *Spalding* v. *Shalmer* and *St. Amand & al'.* Bridgm. 37. Townley *v.* Sherborn. S. P. *A.* and *B.* Truſtees received

1000 *l.* each, on Sale of a Truſt-Eſtate, and both joined in Receipt for the Money, as they did in the Sale and the Conveyances, *B.* became inſolvent. Wright K. doubted if *A.* ſhould anſwer the whole. 2 Vern. 504. pl. 453. Fellows *v.* Owen.——1 P. Will. Rep 81. pl. 83. S. C. And there ſaid that the *Ceſtui que Truſt* was preſent, and conſenting to the Payment as above; and at his Importunity the Truſtees joined in Acquittance for the whole. Decreed that *A.* ſhould not anſwer for *B*'s. 1000 *l.*

2. But

2 Vern. 570. Murrel *v.* Cox. 1 Salk. 318. Churchil *v.* Hopſon, S.P.

2. But if two Executors join in the Sale of the Goods, *&c.* of the Teſtator, they ſhall be both chargeable, though one of them only received the Money, for there was no Neceſſity for their joining.

2 Abr. Eq. Caſ. 742. Lord Chancellor ſaid, that it could not be expected that all the Truſtees ſhould meet together to receive the Money; but if they had,

3. *J. S.* by Will, 1724, gave 650 *l.* to *R.* and two other Truſtees, *in Truſt* to build and endow an Alms-houſe in *Cornwall* for Maintenance of five poor Women, and made *M.* and *N.* Executors, and appointed the 600 *l.* to be paid within ſix Months after his Death, with Intereſt. *R.* lived in *London*, and the other Truſtees in *Cornwall*. *R.* called on the Executors for the Money, who refuſed to pay it, unleſs the two other Truſtees would join in a Receipt. *R.* procured a Receipt, and received all the Money, and paid at Times, by Directions of the other Truſtees for building, *&c.* 400 *l.* and about four Years after the Money firſt received failed, and was then inſolvent. On a Bill for an Account againſt all the three Truſtees, Lord Chancellor decreed *R.* only to be chargeable.

either one muſt have had the Cuſtody of the whole, or it muſt be divided into Shares. Suppoſe all the Money had been lodged in a Banker's Hands *bona fide*, and he had failed, ſhould the Truſtees have been anſwerable, *&c.* And if they intruſt one of themſelves for *Convenience* or *Neceſſity*, at a Time when he is ſolvent, which is no more than making him their Banker, ſhall Equity puniſh where there is no Default? and this is the very Caſe of Churchill *v* Hopſon; and to charge Truſtees in ſuch a Caſe, would make the Caſe of the Truſtees, who are neceſſary for the common Good and Convenience of Families, *&c.* very perilous, and his Lordſhip ſaid, he ſaw no Reaſon why Truſtees may not make one of themſelves their Caſhier, where there is no Fraud. That this was a reaſonable Thing, *R.* at that Time being the only Truſtee, who lived in *London*, where the Money was paid, *&c.* And as to an Objection made as to the letting the Money lie ſo long in *R.*'s Hands, he ſaid the Caſe of *R.* differs from the Caſe of a common Banker, where the Money may be drawn out at Pleaſure; but here *R.* had as good a Right to the Keeping of it as the others, and all was paid out to about one Third, and he was intruſted by the Teſtatrix as much as the other. Ibid.——If *one Truſtee directs the Payment of the Truſt-Money over to the others*, and *joins in the Deed*, he charges and makes himſelf liable for the Default of the other. Said to have been ſo lately held in Chancery in the Caſe of Serjeant's Webb's Will. Ibid.

Bridgm. 38. Townly *v.* Sherborne.

4. But if, upon the Proofs or Circumſtances, the Court be ſatisfied that there be *Dolus Malus*, or any evil Practice, Fraud, or ill Intent in him that permitted his *Companion to receive the whole Profits*, he may be charged, though he received nothing.

Bridgm. 38. Townly *v.* Sherborne. Cro. Car. 312. S. C. The Truſtees both ſealed the Counterpart of the Aſſignment, and joined

5. If there are two Truſtees, and one of them without Warrant of the Party that Truſts him, or of a Court of Equity, aſſigneth his Eſtate, and the Aſſignee receives the Profits, and becomes inſolvent, he that made the Aſſignment ſhall anſwer it for him; but the other original Truſtee ſhall anſwer for no more than what he receiveth, becauſe the Aſſignee cometh not in by him, or by his Aſſent or Appointment; and in Caſe ſuch original Truſtee, who did not make the Aſſignment, receive the whole Profits and becomes inſolvent, neither the Aſſignor or Aſſignee ſhall be anſwerable for them.

in Acquittances for Rent for a Year and an Half; but the other never meddled further. Reſolved by Lord Keeper, aſſiſted by four Judges, whereof Crooke J. was one, that the other, being only a Party intruſted, ſhall not be anſwerable for more than came to his Hands; for it was the Default of him who put them in Truſt, to repoſe Truſt in one who was not able to pay; and he being truſted as well as the other, the other ſhall not be compellable to make good his Defect; and ſo reverſed a Decree whereby the other Truſtee was made liable to pay.—S. C. cited 2 Vern. 516. and it is there ſaid, that the making joint Truſtees by the joining in Receipts to be anſwerable for each other (as in the above Caſe) ſeemed to be againſt natural Juſtice, unleſs they had ſo joined in Receipt, as not to be diſtinguiſhed what had been received by one, and what by the other; that there indeed, of Neceſſity they muſt both be charged with the whole; and that is from their own Neglect or Default; as if another Man ſhould blend his Money with mine, by rendering my Property uncertain he loſes his own; and that there was a Difference between Joint Truſtees and Executors; Executors may act ſeparately, if they think fit; but if a Truſt Eſtate is to be ſold, the Truſtees muſt both join in conveying, and alſo in Receipts; otherwiſe no one will purchaſe. And ſince one Truſtee has equal Power, Authority and Intereſt, with the other, the one cannot in Reaſon inſiſt, or deſire to receive more of the Conſideration Money than the other, or to be more Truſtee than his Partner or Co Truſtee

(L) In what Cases Trustees shall give Security; and when be discharged or removed.

1. WHERE a Trustee *is Insolvent*, the Court of Chancery will compel him to give Security before he shall enter upon the Trust. Carth. 458. The King *v.* Raines.

2. One Trustee was *decreed, at his own Request, to release to the other* and his Heirs his Trust, and that the other should sell the Premises devised to be sold. Fin. Rep. 380. Travell *v.* Danvers. Meers and Holbetch.

3. Likewise a Trustee was removed out of the Trust, though much against his Will. 2 Chan. Ca. 130. Uvedale *v.* Ettrick.

(M) The Power of Cestui que Trust.

1. *Cestui que Trust* hath *Jus Habendi* and *Jus Disponendi*, and though in Law he hath neither *Jus in Re*, nor *Jus ad Rem*, yet in Equity he hath both. Mod. 38. Smith *v.* Wheeler. 1 Rep. 121. b. Chudleigh's Case.——So where he is *Cestui que Trust of a Possibility*. Mo. 806, pl. 1093. Cole *v.* Moore.—But *Cestui que Trust of a Surplus* has but a bare Possibility, and *cannot sell*. Chan. Ca. 208. Arg. Lord Cornbury *v.* Middleton.—Unless the Trustees are Parties. Chan. Ca. 175. Backhouse *v.* Middleton.—Any Disposition by *Cestui que Trust is binding upon the Trustee* in a Court of Equity, and even at Law. Chan. Prec. 415.

2. *Cestui que Trust of a personal Estate* may *sue in Chancery* to have an Account against the Executor or Administrator, and at the same Time in the *Prerogative Court*, to inforce them to bring in an Inventory. 3 Chan. Rep. 72. Digby *v.* Cornwallis.

3. Likewise *Cestui que Trust* may bring *Account* against the *Bailiff appointed* by his Trustee to manage the Estate of *Cestui que Trust*, after such Bailiff has accounted to Trustee. 2 Chan. Ca. 121. Pollard *v.* Downes.

4. *Mortgagor in Fee, after the Mortgage-Money paid*, is a *Cestui que Trust*; and *a Will of the Lands* made by such Mortgagor, before the Mortgage, (notwithstanding such Mortgage, and that for want of a Reconveyance the Estate in Law was in the Mortgagee, and so a Verdict at Law passes against the Devisee of such Mortgagor) is good, and not revoked by such Mortgage, especially in this Case, where there was no Republication after the Discharge of the Mortgage. 2 Chan. Rep. 297. Hall *v.* Dench.

5. It has been held by some that even a *Bargain and Sale* inrolled by *Cestui que Trust of an Estate Tail*, shall bind the Issue in regard that such a Trust is not within the Statute *De Donis*. 1 Vern. 440. pl. 412. Carpenter *v.* Carpenter alias Washborne *v.* Downes.

6. But a *common Recovery* suffered, or a *Fine* levied by *Cestui que Trust* of an Estate-Tail, has the same Effect in Equity as it would have at Common Law, in case the legal Estate was in him. Resolved by Ld. Chan. Id. ibid. It had been doubted, whether the Recovery of *Cestui que Trust* in Tail, with the Remainder to another in Tail, should bar the Remainder, because it was no settled Interest vested; and Bridgman Ch. J. was of Opinion it should not But it was referred to a Case and Judges to consider of it. Chan. Ca. 68. Ld. Digby *v.* Langworth.

7. A *Tender to Cestui que Trust* of Money due on a Bond, and a Refusal, is a good Plea to Action of Debt on the Bond made to Trustee. 1 Lutw. 577. Lynch and Templeman *v.* Clemence.

(N) Of Forfeitures by Ceſtui que Truſt.

Hard. 467. Pawlet *v.* The Attorney General.

1. *Ceſtui que Truſt* for Years may *forfeit* his Intereſt for *Felony*, but *Ceſtui que Truſt* in Fee cannot; *per Hale* Ch. J.

3 Chan. Rep. 36, 37. 5th Reſolution. Attorney General *v.* Sands.

2. Truſt of a *Leaſe in Groſs* ſhall be forfeited for Felony, as the Earl of *Somerſet's* Caſe in *Hob.* *Daccomb's* Caſe, and *Cro.* J. *Babington's* Caſe, and Sir *W. Raleigh's* Caſe; but otherwiſe of a Term aſſigned over to wait on the Inheritance.

Godb. 319. Sheffield *v.* Radcliff.

3. *Ceſtui que Truſt of Eſtate for Life levies a Fine*, it is no Forfeiture, but good by the Stat. of 1 *R.* 3. *c.* 1. during his own Life, and if Proclamations paſs there needs no Claim or Entry within five Years.

3 Ch. R. 34. Attorney General *v.* Sands.

4. But *Ceſtui que Truſt* in Fee or Fee-Tail *forfeits the ſame by Attainder* of Treaſon, and the Eſtate is to be executed to the King in a Court of Review by the Stat. 33 *H.* 8. 27 *H.* 8. *c.* 10.

3 Ch. R. 35. Attorney General *v.* Sands, cites Holland's Caſe.

5. Where an *Alien* is *Ceſtui que Truſt* of an Eſtate; the Truſt belongs to the King.

3 Ch. R. 36. Attorney General *v.* Sands.

6. If *Ceſtui que Truſt dies without Heir*, the Land ſhall be diſcharged of this Truſt. As if a Tenant in Fee of a Rent-charge die without Heir, or be attainted of Felony, the Land is diſcharged.

3 Ch. R. 35. Attorney General *v.* Sands.

7. If *Ceſtui que Truſt* is *indebted to the King*, he ſhall have Execution of this Truſt both by the Common Law, and the Practice of the Court of Exchequer.

1 Chan. Ca. 268. Clifford *v.* Aſhley.

8. A *Fine* with Proclamation and Non-Claim will *bar* a Truſt, and ſo it was reſolved in the Exchequer, and an *Entry* on the Land by a *Ceſtui que Truſt* is not ſufficient *Claim*, but it muſt be a *Subpœna*; *per* Lord Keeper *Finch.*

1 Abr. Equ. Caſes 131. Attorney General *v.* Hindley.

9. If a Truſtee does by Fraud, and Combination with the *Ceſtui que Truſt*, *endeavour to evade any Penal Law*, as the Statute of Simony, *&c.* under Pretence that a Truſt is only cognizable in Equity, and that Equity ſhould not aſſiſt a Penalty or Forfeiture; yet Chancery will aid remedial Laws, and not ſuffer its own Notions to be made uſe of to elude any beneficial Law.

Of

Of USURY.

1. USURY, in a ſtrict Senſe, is a Contract upon the Loan of Money, to give the Lender a certain Profit for the Uſe of it, upon all Events, whether the Borrower made any Advantage of it, or the Lender ſuffered any Prejudice for the want of it, or whether it be paid on the Day appointed, or not.

2. And in a larger Senſe it ſeemeth, that all undue Advantages taken by a Lender againſt a Borrower, came under the Notion of Uſury, whether there were any Contract in Relation thereto, or not; as where one in Poſſeſſion of Land, made over to him for the Security of a certain Debt, retains his Poſſeſſion after he has received all that is due, from the Profits of the Land.

The Conſideration of this Offence may be reducible to the following Heads, wherein we ſhall enquire.

(A) Of Uſury at Common Law.
(B) Of Uſury by the Statute Law.
(C) What Kinds of Agreements or Contracts ſhall be deemed uſurious, and what not.
(D) What Kind of Hazard or Caſualty will bring an Agreement, &c. out of the Statute of Uſury.
(E) In what Caſes Securities ſhall be forfeited or avoided on Account of Uſury.
(F) In what Caſes a Forfeiture of treble Value ſhall be incurred on Account of Uſury.
(G) In what Caſes Relief is given againſt uſurious Contracts.
(H) How far Sureties are affected by uſurious Contracts.
(I) What Informations will lie in Caſes of Uſury, and where they are good, and where not.
(K) Of the Pleadings in Caſes of Uſury.
(L) Of the Trial and Evidence in Caſes of Uſury.

(A) Of Usury at Common Law.

Hawk. P.C. 245. But per Hale C. J. Jewish Usury, being 40 per Cent. and more, was prohibited at Common Law, but no other. Hard. 420. Anon.

1. ANtiently it was holden to be absolutely unlawful for a Christian to take any Kind of Usury, and that whosoever was guilty of it was liable to be punished by the Censures of the Church in his Life-time: and that if after Death any one was found to have been an Usurer while living, all his Chattels were forfeited to the King, and his Lands escheated to the Lord of the Fee.

Hawk. P.C. 245.

2. Also it seemeth to have been the Opinion of the Makers of some Acts of Parliament, as 5 *Ed.* 6. *c.* 20. 13 *El.* 8. *Sect.* 5. and 21 *Jac.* 1. *c.* 17. *Sect.* 5. That all Kinds of Usury are contrary to a good Conscience.

Id. Ibid.

3. And agreeably thereto it seemeth formerly to have been the general Opinion, that no Action could be maintained on any Promise to pay any Kind of Use for the Forbearance of Money, because that all such Contracts were thought to be unlawful, and consequently void.

Id. Ibid.

4. But it seemeth to be generally agreed at this Day, that the taking of reasonable Interest for the Use of Money is in itself lawful, and consequently that a Covenant or Promise to pay it, in Consideration of the Forbearance of a Debt, will maintain an Action; for why should not one who has an Estate in Money, be as well allowed to make a fair Profit of it, as another who has an Estate in Land? And what Reason can there be, that the Lender of Money, should not as well make an Advantage of it as the Borrower? Neither do the Passages in the *Mosaical* Law, which are generally urged against the Lawfulness of all Usury, if fully considered, so much prove the Unlawfulness, as the Lawfulness of it; for if all Usury were against the Moral Law, why should it not be as much so in respect of Foreigners of whom the *Jews* were expressly allowed to take it, as in respect of those of the same Nation, of whom alone they were forbidden to receive it? From whence it seems clearly to follow, that the Prohibition of it to that People was merely Political, and consequently doth not extend to any other Nation.

(B) Of Usury by the Statute Law.

1. BY the 37 *H.* 8. *c.* 9 And the 13 *Eliz. c.* 1. The Rate of Interest is not to exceed 10 *l.* in the 100 *l.* By—

2. The 21 Jac. 1. c. 17. s. 2. *None shall upon any Contract, directly or indirectly, take for the Loan of any Money, or other Commodities, above the Rate of* 8 l. *for* 100 l. *for one whole Year, in Pain to forfeit the treble Value of the Money, or other Things lent.*

3. S. 5. *This Law shall not be construed to allow the Practice of Usury in Point of Religion or Conscience.*

4. By

4. By the 12 Car. 2. c. 13. ſ. 2. *None ſhall take, directly or indirectly, for the Loan of Money, or other Commodities, above the Value of* 6 *l. for the Forbearance of* 100 *l. for one Year, and ſo after that Rate, and all Bonds, Contracts,* &c. *whereupon more ſhall be reſerved, ſhall be void. They that receive more, ſhall forfeit the treble Value of the Money or other Things lent.*

A Mortgage was made at 8 *l. per Cent. before the making of this Statute* reducing Intereſt to 6 *l. per Cent.* The Mortgagor *continued paying Intereſt of* 8 l. per Cent. *for* 15 *Years after this Statute*, and then the Mortgagee entered. The Mortgagor brought a *Bill to redeem*. The Queſtion was whether the 2 *l. per Cent.* received for the 15 Years, ſhould not be allowed in Diſcharge of ſo much Principal? The Court denied Relief as to the Money paid by the Plaintiff; but decreed 6 *l. per Cent.* only, to be allowed from the Defendant's Entry on the Eſtate. 2 Vern. 42. pl. 37. Walker *v.* Penry.——On a Re-hearing the Decree was confirmed, as to the 2 *l. per Cent.* Ibid. 78. pl. 73. Lord C. *Jefferies* having been of Opinion, that the Statute had *no Retroſpect* beyond 1660. but looked forwards to Contracts and Agreements then after to be made, and not to any Contracts and Agreements before that Time, and having decreed Account to be taken accordingly, as above, now upon the Bill of Review, Lord Commiſſioner *Trevor*, becauſe there was a Decree already made in it, would not reverſe it; but Lords Commiſſioners *Rawlinſon* and *Hutchins*, on reading the Act of Parliament, held the Act had a Retroſpect, and makes it unlawful to take more than 6 *l per Cent.* upon any Contracts whether made before or after the Act of Parliament; but that Part of the Statute which adds Penalties, relates only to Contracts and Agreements then after to be made. 2 Vern. 145, 146. pl. 141. Walter *v.* Penry ——Abr. Equ. Ca. 288. (D) pl. 1. cites 2 Vern 145. S. C. And adds, that *Rawlinſon* and *Hutchins*, Lords Commiſſioners, held the Decree ſhould be reverſed, againſt Lord *Trevor*.

5. But the 12 *Ann. ſtat.* 2. *c.* 16. Enacts, *That no Perſon upon any Contract, which ſhall be made after the* 29*th of* September 1714. *ſhall take for Loan of any Money, Wares,* &c. *above the Value of* 5 *l. for the Forbearance of* 100 *l. for a Year; and all Bonds and Aſſurances for Payment of any Money to be lent upon Uſury, whereupon or whereby there ſhall be reſerved or taken above five in the Hundred, ſhall be void; and every Perſon which ſhall receive, by Means of any corrupt Bargain, Loan, Exchange, Chevizance, Shift, or Intereſt of any Wares, other Things, or by any deceitful Way, for the Forbearing or giving Day of Payment for one Year, for their Money or other Things, above* 5 *l. for* 100 *l. for a Year,* &c. *ſhall forfeit the treble Value of the Monies or other Things lent.**

*It ſeems to be now ſettled that the Statute of 12 *Annæ*, *c.* 16. which reduces the Intereſt of Money to 5 *l. per Cent.* has not a Retroſpect to any Debts contracted before; but that they ſhould carry Intereſt according to the Intereſt allowed, or Agreement made at the Time of the Debt contracted.—And Serjeant *Hawkins*, from the Expoſitions made of former Statutes, ſays that a Contract made before the Statute is no way within the Meaning of it, and therefore it is ſtill lawful to receive 6 *l. per Cent.* in reſpect of any ſuch Contract. Hawk. P. C. 246.

6. The Expoſitions which have been made of the former Statutes being very applicable to the laſt, which is almoſt in the ſame Words, the proper Conſtruction of it will be beſt collected by a due Attention to the following Heads.

(C) What Kinds of Agreements or Contracts ſhall be deemed uſurious, and what not.

1. IT hath been reſolved, that an Agreement to pay double the Sum borrowed, or other Penalty on the Non-payment of the Principal Debt at a certain Day, is not uſurious, becauſe it is in the Power of the Borrower wholly to diſcharge himſelf, by repaying the Principal according to the Bargain. Hawk. P. C. 245.

2. But

Hawk. P.C. 248. 2. But if it were originally agreed, that the principal Money ſhould not be paid at the Time appointed, and that ſuch Clauſe was inſerted only with an Intent to evade the Statute, the whole Contract is void; for the Conſtruction of Caſes of this Nature muſt be governed by the Circumſtances of the whole Matter, from which the Intention of the Parties will appear in the making of the Bargain, which, if it was in Truth uſurious, is void, however it may be diſguiſed by a ſpecious Aſſurance.

Cro. Jac. 509. pl. 20. Roberts v. Trenayne. 3. So if both Principal and Intereſt be ſecured, yet if it be *at the Will* of the Party who is to pay it, it is no Uſury; *per Doddridge* J. As if I lend to one 100 *l.* for two Years, to pay for the Loan thereof 30 *l.* and if he pay the Principal at the Year's End, he ſhall pay nothing for Intereſt, this is not Uſury; for the Party has his Election, and may diſcharge himſelf by paying it at the firſt Year's End.

Vent. 254. Hedgeborough v. Roſenden. 4. But if a Man contracts *to pay more Intereſt than the Statute allows, if the Plaintiff requires it*; though the Plaintiff *never does require it*, yet it is within the Statute of Uſury.*

*It has been held that in an Aſſurance for the Payment of fifty Shillings for the Uſe of 100 *l.* for ſix Months, the Computation ſhall be by Kalendar and not by Lunar Months, becauſe by the latter the Intereſt would exceed the Rate allowed by the Statute. Hawk. P. C. 247.

Cro. Eliz 20. pl. 5. Pollard v. Scoly. 5. Nevertheleſs it has been held, that if one *contracts to have more than the Statute allows, but he takes nothing of the Intereſt contracted for*, he is not puniſhable by the Statute; *but if he takes any Thing, if it be but a Shilling*, it is an Affirmance of the Contract, and he ſhall render for the whole Contract.

Le. 96. pl. 125. in Sir Woolaſton Dixy's Caſe. 6. So if I lend 100 *l. without any Contract for Intereſt*, and afterwards at the End of the Year the Borrower gives me 20 *l.* for the Loan thereof, the ſame is within the Statute; for my *Acceptance* makes the Offence without any Contract or Bargain. *Per Gent.* J.

Br. Uſury, pl. 1. But if the Condition be that the Vendor repay ſuch a Day, a Year, or two Years after, this is Uſury; for he is ſure to have the Land and the Rents and Profits for that Year, or for thoſe two Years. Id. Ibid. 7. Where a Man *for* 100 *l. ſells his Land, upon Condition* that *if the Vendor or his Heirs repay the Sum before the Feaſt of* Eaſter, or ſuch like, then next following, that then *he may Re-enter*, this is no Uſury; for he may re-pay the next Day, or any Time before *Eaſter*, and therefore he has no Gain certain to receive any Profits of the Land.

Mo. 397. pl. 520. Reynolds v. Clayton, cites it as adjudged in B. R. Becher's Caſe. 8. But where *B delivered Wares of the Value of* 100 *l.* and no more, and *took a Bond*, with a Condition to *redeliver the Wares to* B. *within a Month or to pay* 120 *l. at the End of the Year*. The Obligation was adjudged void by the Statute of Uſury.

Mo. 398. pl. 520. cites it as Wick's Caſe of Gloceſterſhire. 9 So if *A.* comes to borrow Money, and *B.* ſays he will not lend Money, but *he will ſell Corn*, &c. and give Day for Payment at ſuch a Rate, which *Rate* exceeds 10 *l.* in the 100 *l.* it is Uſury.

Mo. 644. pl. 890. Worley's Caſe. 10. If one gives the *Profits of his Lands*, worth 10 *l.* for Intereſt for a Year of 100 *l.* though he *receives Part* of the Profits *daily*, this is not Uſury above 10 *l.* for the 100 *l. Per Popham, Gawdy*, and *Yelverton*, but *Fenner è contra.*

Cro C. 283. Gryſill v. Wytchcott. 11. So where *one mortgaged Land for* 100 *l.* and *took Bond for the Intereſt of* 8 *l. a Year, payaple Half-yearly*. The Queſtion was whether that makes the Bargain uſurious againſt the Statute, becauſe, as it was inſiſted, the Uſe ought not to be paid until the End of the Year, and contracting to have Half of it *Half-yearly* it is not warrantable by the Statute? But the Court held that it is not any uſurious Contract, contrary to the Statute, becauſe

because the 100*l.* is lent for a Year, and the Reversion is not of more than what is permitted by the Statutes; and the reserving it Half-yearly is allowable; for he does not receive any Interest for more or less Time than his Money is forborn. It was adjudged for the Plaintiff, and affirmed in Error.

12. It is to be observed, that the Loan of Money for lawful Interest allowed by the Statute, shall not be construed to be within the Purview of it, in respect of any Expectations which the Lender may have of a voluntary Gratuity to be given him by the Borrower, if there be no Kind of Agreement relating to it. Hawk. P.C. 248. s. 18.

13. But a Contract reserving to the Lender a greater Advantage than is allowed by the Statute, is equally within the Meaning of it, whether the whole be reserved by way of Interest, or in Part only under that Name, and in Part by way of Rent for a House, let at a Rate plainly exceeding the known Value. Id. Ibid. s. 22.

14. A Bankrupt having *borrowed* a great Sum of *Money* of the Defendant *for one Quarter of a Year, he was to give* the Defendant 6*l. for every* 100*l.* that he borrowed; *and some Silk being the Security, he was to give him one Pound more* for every 160*l.* for that Quarter, *for the Use of his Warehouse.* The Question upon the Trial was, whether this Contract made between the Bankrupt and the Defendant is an usurious Contract? and the Jury having found a Verdict for the Defendant, Serjeant *Cheshire* moved for a new Trial; for he said the Verdict was against Law. *Holt* Ch. J. said he thought it was a wrong Verdict, and it was ordered to be moved again. Holt's Rep. 706. Le Blance & al' v. Harrison.

15. If a Sum of Money is given in Consideration of an Annuity, though the yearly Payment exceeds the Rate of Interest, yet it is not Usury. Thus

16. Where *A. asks to borrow of B.* upon Interest, and *B. refused to lend* for Interest; *but said that for Annuity or Rent he would*; and so it was agreed, and a Rent granted for twenty-three Years, amounting to more than the Statute allows for Interest, &c. It seems this is not Usury within the Statute. And. 121. pl. 169. Finch's Case.

17. If *A.* gives 300*l.* to *B.* to have *an Annuity of* 5*l.* assured to him *for* 100 *Years*, if *A.* and his Wife and four of his Children *so long shall live. Per Cur.* This is not within the Statute of Usury. So if there had not been any Condition. But Care is to be taken, that there be no Communication of borrowing of any Money before. Held *per tot. Cur'*. 4 Le. 208. pl. 334. Fuller's Case.

18. So where *A.* on the 17th of *July* 1579. lent 100*l.* to *B.* who thereupon granted to *A.* and his Heirs an *Annuity of* 20*l. a Year, on Condition that if* the said *B.* the *Grantor paid to* A. *at* Christmas 1580 *the said* 100*l.* that then *the Annuity should cease.* Adjudged this is not within the Statute; for nothing was to be paid for Interest within a Year and a Quarter after the Grant; and if the 100*l.* had been paid on the Day, the Annuity was to cease without paying any Thing; so that it is only a plain Bargain, and a conditional Purchase of an Annuity. 5 Rep. 69. Burton's Case.

19. *But* if it had been *agreed* between *A.* and *B. that notwithstanding such Power of Redemption, the* 100*l. should not be* paid *at the Day*, and *so* that the *Clause of Redemption was inserted to evade the Statute*, then this had been an usurious Contract and Bargain within the Statute; for if in Truth the Contract be Usurious against the Statute, no Colours or Shews of Words will serve, but the Party may shew it, and he shall not be concluded or estopped by any Deed in any other Matter whatsoever; for the Statute gives Averment in such Case. 5 Rep. 69. Burton's Case.

20. Where *A.* for 100*l. granted a Rent* of 20*l. for eight Years, another of* 20*l. a Year for two Years, if* B. C. *and* D. *should so long live.* In Replevin the Defendant avowed for the Rent, and the Plaintiff pleaded the Statute of Usury, and set forth the Statute and a special usurious Contract. And in this Case it was said, that, if it had been laid to be upon a Loan of Money, then it was Usury; but if it be a Bargain for an Annuity, it is no Usury; but *that* this was alledged to be upon a Lending. Brownl. 180. Cotterel v. Harrington.

21. So

Cro. Ja. 252. pl. 7 Fountain *v.* Grymes. Hawk. P.C. 247. ſ. 15. ſays, that the *Grant of an Annuity for Lives not only exceeding the Rate allowed for Intereſt, but alſo* exceeding *the known Proportion for Contracts of this Kind*, in Conſideration of a certain Sum of Money, is not within the Meaning of the Statute, unleſs there were ſome underhand Bargain for the Security of the Re-payment of the Principal or Conſideration Money.

21. So where in Debt upon Bond, the Defendant *pleaded* the Statute of Uſury, and *that he came* to the Plaintiff *to borrow of him* 120l. *according to the Rate of* 10l. per Cent. *who refuſed to lend the ſame, but corruptly offered to deliver* 120l *to him, if he would be bound to pay him* 20l. per Ann. *during the Plaintiff's Wife's and his Son's Lives:* Whereupon he entered into a Bond. Reſolved that this, being an abſolute Bargain, in Conſideration of the Payment of 20*l. per Ann.* during two Lives, and no longer, and *no Agreement to have the principal Money*, was out of the Statute of Uſury; *but if* there had been *any Proviſion for the Re-payment of the Principal, although not expreſſed within the Bond*, it had been an uſurious Agreement within the Statute. And Judgment for the Plaintiff.

Sid. 182. pl. 1. Rowe *v.* Bellaſis. The Plea in this Caſe was held ill, being after Judgment.

12. *A.* after the Statute 12 *Car.* 2. *viz.* 3 *June* 13 *Car.* 2. *agreed to lend* B. 100*l.* and that for the Forbearance thereof for the Time underwritten, *B.* the Defendant *ſhould pay* to *A.* the Plaintiff 120l. *as follows*, viz. 40l. *upon the* 20*th of* Jan. *and* 20*th* July, *by equal Portions annually next after* the 20th Day of the then Inſtant Month *July, till the* 120l. *be paid*; which exceeded the Rate of 6*l. per Cent. And for the further Security* B. *gave a Bond of* 200l. *and confeſſed a Judgment. Twiſden* J. ſaid that the Contract here was not Uſurious, but is a Purchaſe of an Annuity for three Years.

2 Mod. 307. Ballard *v.* Oddey. See *Poſt* Letter (E)

23. It is to be obſerved, that if the *Agreement* of the Parties be *honeſt*, but is *made otherwiſe by the Miſtake of a Scrivener*, yet it is not Uſury.

(D) What Kind of Hazard or Caſualty will bring an Agreement, &c. out of the Statute of Uſury.

Show. 8. Maſtin *v.* Abdee.

1. IT has been held, that if Principal and Intereſt be in Hazard upon a Contigency, it is no Uſury, *though the Intereſt* do exceed the allowed Rates *per Cent.* And when there is an *Hazard that the Plaintiff may have leſs than his Principal*, it is no Uſury. Thus—

Cro. Ja. 308. pl. 10. Roberts *v.* Trenayne.

2. If *S.* lend 100*l* to have 120*l* at the Year's End upon Caſualty, if the *Caſualty goes to the Intereſt only, and not to the Principal*, it is Uſury; for the Party is ſure to have the Principal again, come what will; but if the *Intereſt and Principal are both in Hazard*, it is not then Uſury. *Per Doderidge* J.

Moor 397. pl. 528. Reynolds *v.* Clayton.

3. In Debt upon Obligation of 60*l.* the Defendant pleaded the Statute, and *ſhewed that it was agreed* between the Plaintiff and Defendant 14 *December*,

All the Court held, upon the two Statutes of 37 H. 8. and 13 Eliz. that the Bond was void, becauſe it appears to be made by corrupt Means to have more than 10*l. per Cent.* which the Statute of 37 H. 8. intended to puniſh. And by the *Proviſo*, it appears that the Intent was, *if one was indebted* to another *truly without Loan and Intention of Uſury*, then in ſuch Caſe *Bonds and Conveyances of Land for ſecuring the true Debt, are out of the ſaid Statute*; but if there is a Borrowing of Money, and a Communication for Intereſt, the Deviſe to be beyond the Rate of 10*l per Cent.* is fraudulent, and within the ſaid Statute, otherwiſe the Statute would be vain; for he might as well have made the Condition, that if 20 Perſons, or any of them, ſhould be living at the Day, *&c.* then he ſhould have 33*l.* And of this Opinion were *Popham* Ch. J. of *B. R.* and *Peryam* Ch. B. 2 And. 15. pl. 8. S. C. 5 Rep. 70. Clayton's Caſe, S. C. reſolved that it was an uſurious Contract.

cember, that the Plaintiff ſhould lend the Defendant 30*l.* *to be repaid the firſt of* June *following, and* that the Plaintiff *ſhould have* 3*l.* *for the Forbearance, if the Plaintiff's Son ſhould be then living*; and *if he died then to pay but* 26*l.* *of the Principal* Money. The Court inclined that it was within the Statute of Uſury; whereupon the Plaintiff, who had demurred, became nonſuit.

4. So where *A.* agreed with *J. S.* to give him 10*l.* for the Forbearance of 20*l.* for a Year, *if B. his Son were then alive.* It was held by three Juſtices (*Glanvil abſente*) to be Uſury, by Reaſon of the corrupt Agreement, and it is the Intent makes it ſo or not ſo. Cr. El. 642. pl. 43. C. B. Button *v.* Downham.

5. Likewiſe where the Obligor was bound in a *Bond* of 300*l.* conditioned *to pay* 22*l.* 10*s.* Premium, *at the End of the firſt three Months* after the Date, &c. *and* 6*d.* *in the Pound at the End of Six Months*, as a farther Premium, *together with the Principal* itſelf, *in Caſe the Obligor be then living*; *but if he dies within that Time*, then *the Principal to be loſt.* This was adjudged an uſurious Contract, becauſe there was *a Poſſibility* that the Obligor might live ſo long; *and* there is *an expreſs Proviſion to have the Principal again.* 3 Salk. 390. pl. 3. Malon *v.* Abdy. Comb. 125. S. C.

6. But where the Bargain is merely caſual, and the whole depends on a Contingency, there the Contract is not uſurious. Thus—

7. Mr. *Spencer* being in Poſſeſſion of an Eſtate of 700*l.* a Year, and of a perſonal Eſtate in Goods and Plate, *&c.* worth 20,000*l.* and owing about 20,000*l.* to Tradeſmen, being about 30 Years of Age, of a hale Conſtitution, but impaired by Irregularity; and the Dutcheſs of *Marlborough* his Grandmother, being then 78 and of a good Conſtitution, made the Defendant a Propoſal, that for 5000*l.* paid down, he would engage to pay 10,000*l.* if he ſurvived the Dutcheſs, which after ſome Deliberation was accepted by the Defendant; and Mr. *Spencer* gave him a Bond for the Payment of 10,000*l.* in ſix Months after the Death of the Dutcheſs, in caſe he ſhould be then living. The Dutcheſs lived ſix Years after and then died, giving Mr. *Spencer* by her Will a very conſiderable Eſtate. Then Mr. *Spencer* confeſſed a Judgment to Defendant for 10,000*l.* and afterward paid him 2000*l.* in Part of it, and then died, about a Year and eight Months after the Dutcheſs. A Bill was brought to be relieved againſt this Demand, upon Payment of the principal Sum with legal Intereſt, on account of its being an unconſcionable Bargain, and againſt the publick Good. Earl of Chesterfield *&al'*, Executors of Mr. John Spencer, *v.* Sir Abraham Janſen. MS. Rep. in Canc. Trin. 24 Geo. 2. And ſee the Caſe very fully reported in Atk. Rep. 301.

8. Lord Chancellor called to his Aſſiſtance Lord Chief Juſtice *Lee*, Lord Chief Juſtice *Willes*, Sir *John Strange* Maſter of the Rolls, and Mr. Juſtice *Burnet*; who gave their Opinions in *Hil.* Term 1750. that no Contract can be fraudulent within the Statute, where it is not for the Forbearance. There may be many Contracts which this Court ſets aſide, though not Uſurious, as Marriage Brocage Bonds, Place Brocage Bonds, *&c.* but here appears no Fraud or Impoſition in this Caſe, and the Party himſelf has confirmed it: This was a meer Contingency, and the whole Money might have been loſt; it is a Bargain of Chance, and a meer Wager, and refuſed the Relief prayed by the Plaintiffs.

9. So where *A.* delivered to *B.* 100*l.* who by Indenture covenanted with *A. to pay to every one of* A.'s *Children which then were and ſhould be living at* 10 *Years end*, 80*l.* *A.* having then five Daughters; and for Aſſurance mortgaged a Manor, and was bound in a Statute of 500*l.* it is not Uſury, but a meer *caſual Bargain.* But if it were to pay 400*l.* at 10 Years End, *if any were living*, then it would be a greater Doubt; or if it had been to pay 300*l.* if any were living at one or two Years End, that had been Uſury, becauſe of the *Probability* that one of them would continue alive for ſo ſhort a Time; but in 10 Years are many Alterations. Cro. Eliz. 741. pl. 15. Bedingfield *v.* Athley.

10. But

Cro. Ja. 507. pl. 20. Roberts v. Trenayne.

10. But where *M.* lent *C.* 150*l.* for Repayment of which *C. leaſed a Cloſe to* M. *for* 60 *Years, to begin at the End of two Years*, upon Condition that *if he paid the* 150*l. at the End of the two Years, the Leaſe to be void*; and it was agreed that for the deferring and giving a Day of Payment for the two Years, *C. ſhould pay to* M. *for Intereſt* 22*l.* 10*s. Quarterly, if* M. *ſhould ſo long Live.* In Purſuance of which Agreement *M.* lent the 150*l.* and *A.* made the Leaſe, and granted by Fine to *M.* the Rent of 22*l.* 10*s.* to be paid Quarterly, if *M.* ſhould ſo long live. This was held to be an uſurious Contract, for by Intendment *M.* might have lived above the two Years, and it was an *apparent Poſſibility* that he ſhould receive that Conſideration, whereby ſhe is within the Statute; and alſo that *the Leaſe* taken *for the Payment of the Principal Money, and not for any Part of the Uſury, is within the Statute*, becauſe it is for Security of Money lent upon Intereſt, and for the Security of that which the Statute intended *M.* ſhould loſe.

(E) In what Caſes Securities ſhall be forfeited or avoided on Account of Uſury. *

* See the following Head.

Hawk. P.C. 248. ſ. 21.

1. HERE it is to be premiſed that it is not material, whether the Payment both of the Principal, and alſo of the uſurious Intereſt be *ſecured by the ſame or by different Conveyances*, but all Writings whatſoever, for the ſtrengthening ſuch a Contract, are void.

2 Le. 39. Arg. in Van. Henbeck's Caſe.

2. Where a Bond was made *for more than legal Intereſt, but* at the Payment the *Obligee takes only legal Intereſt*; he ſhall not be puniſhed for the Contract; but perhaps the Bond ſhall be void. Thus—

4 Le. 43. pl. 117. Brown v. Fulſby.

3. Where *A. borrowed of* B. 80*l. and was bound in a Bond to pay him* 90*l. at the End of the Year*; *per Cur.* Though the 90*l. was tendered, and* B. *did tell the ſame, yet if* B. *takes but* 80*l. it is* not Uſury; within 5 *Eliz.* to make a treble Forfeiture; but yet in that Caſe the Obligation itſelf is void.——The *Bond* is void preſently, and if he receives exceſſive Intereſt, he ſhall *forfeit the treble Value*; *Per Clark* J.

3 Le. 205. pl. 260. Body v. Taſſell.

Bulſtr. 17.

4. Where the firſt Contract is not Uſurious, it ſhall never be made ſo by *Matter ex poſt Facto. Per Williams* J. Thus——

Noy 171. Dalton's Caſe. S. P. and reſolved by the whole Court, that the taking the Uſe Money within the Year, ſhall not avoid the Obligation, and is no Uſury within the Statute, becauſe it was not Uſurious at the Beginning.

5. In Debt upon an Obligation, where the Statute of Uſury was pleaded, it was ſaid by *Popham*; upon the Evidence, that if a Man *lends* 100*l. for a Year, and to have* 10*l. for the Uſe* of it, if the *Obligor pays the* 10*l.* 20 *Days before it be due*, that does not make the Obligation void, becauſe it was not corrupt. But *if* upon making the Obligation *it had been agreed, that the* 10*l. ſhould have been paid within the Time*, that would have been Uſury, becauſe he had not the 100*l.* for the whole Year, when the 10*l.* was to be paid within the Year; and Verdict was given accordingly.

And Judgment for the Plaintiff. Bulſt. 17.

7 Mod. 119. The Queen, v. Sewel, *alias* Beaus.

6. Likewiſe if a Man *makes an uſurious Contract* with another, and gives him unlawful Intereſt, *and agrees to give* him a *Bond for the Principal, and after*, by a ſubſequent Agreement, *gives a Bond for the Sum lent to* J. S. *to whom the Lender owes ſo much*, in Satisfaction of his Debt. This Bond is not voidable by the Statute; *Per Holt* Ch. J.

7. So

7. So if a Man *lend Money on a legal Intereſt, and after a ſubſequent Agreement is made* for more Intereſt, which is Uſury; that will not avoid the firſt Contract; *Per Holt* Ch. J. Far. 119. The Queen v. Sewel, *alias* Beaus. For the Words of the Statute are, "That all Aſſurances for the Payment of any Principal, *&c. whereupon* or *whereby* there ſhall be reſerved or taken above the Rate of 5 *l.* in the Hundred, ſhall be void."

8. But if a ſecond Bond be made after the Forfeiture of a former, and conditioned for the Receipt of Intereſt according to the Penalty of the forfeited Bond, this is as much within the Statute as if it had been made before the Forfeiture; for if ſuch a Practice ſhould be allowed, nothing could be more eaſy than to elude the Statute; and though the whole Penalty be due in Strictneſs to the Obligee, yet the true principal Debt is in Conſcience no greater after the Forfeiture of the Bond, than it was before. Hawk. P. C. 248. ſ. 23.

9. A Bond made, to ſecure a juſt Debt payable with lawful Intereſt, ſhall not be avoided by reaſon of a corrupt Agreement between the Obligors, to which the Obligee was no way privy: As where *A.* being indebted to *B.* in 100 *l.* agrees to give him 30 *l.* for the Forbearance of that 100 *l.* for a Year, and gives him a Bond for 60 *l.* for Payment of the 30 *l.* and for the Payment of the 100 *l.* enters into a Bond of 200 *l.* together with *B.* for the Payment of a true Debt of 100 *l.* due from *B.* to *C.* Hawk. P. C. 246. ſ. 11.

10. So where *W.* was *indebted* in 100 *l.* to *A. upon an uſurious Contract on a Bond*, and A *being indebted to* E. *transferred the Debt to* E. and W. *became bound for the ſame uſurious Debt to* E. *whoſe Debt was juſt, and he ignorant of the Uſury.* It was adjudged upon great Deliberation, that the Obligation made by *W.* to *E.* was not avoidable for the uſurious Contract made between *W.* and *A.* becauſe it was given to *E.* for a true Debt, and he knew nothing of the Uſury, though the Ground between *A.* and *W.* was Uſurious. Moor. 752. pl. 1035. Ellis v. Warnes.

11. Likewiſe an Aſſurance made in Purſuance of a fair Agreement for ſuch Intereſt as is allowed by the Statute, ſhall not be avoided by the Fault of the Scrivener, who draws it up in ſuch a Manner as to bring it within the expreſs Letter of the Statute: As where the Parties agree, that 5 *l.* ſhall be paid for the Loan of 100 *l.* for one Year, and the Scrivener in drawing the Bond for it, doth, without the Knowledge of the Parties, who are illiterate Perſons, make the 5 *l.* payable at the End of Half a Year: Or where on the fair Loan of 100 *l.* agreed to be paid with common Intereſt, a Mortgage is made for the 100 *l.* with a Proviſo, that it ſhall be void on Payment of 105 *l.* at the End of one Year, without any Covenant for the Mortgagor to take the Profits till Default be made of Payment, ſo that in Strictneſs the Mortgagee is intituled both to the Intereſt and Profits. Hawk. P. C. 247. ſ. 17.

12. It is to be obſerved, that a Fine levied, or Judgment ſuffered, in Purſuance of an uſurious Contract, may be avoided by an Averment of the corrupt Agreement, as well as any common Specialty, or parol Contract. And in an *Aſſumpſit* if it appear, either upon the Evidence, or from the Plaintiff's own expreſs ſhewing in his Declaration, that the Contract was uſurious, he cannot recover. But a Specialty cannot be avoided by Uſury appearing on Evidence or of the Face of the Condition, but it muſt be pleaded. Hawk. P. C. 248. ſ. 20.

13. If a Judgment be given upon an uſurious Contract, and it is *Part of the Agreement to have a Judgment*, yet the Defendant may avoid ſuch Judgment by *Audita Querela*, or by *Scire Facias* brought on the ſame. Vin. Abr. Tit. Uſury 304.

14. Where *A. mortgaged to B.* on an uſurious Contract for 100*l.* and before the Day of Payment *B. is ouſted by C.* and *B.* brings Action againſt *C. C.* cannot Le. 307 pl. 427 Carter v. Claycole.

cannot plead the Statute of Uſury; for he has *no Title*; the Eſtate being void againſt the Mortgagor. *Per Pertam.*

Farr. 119. The Queen v. Sewel, alias Beaus. 15. But where *A.* lent *B.* 45*l. on a Pledge of Jewels*, and it was agreed to pay 9*l.* for it for a Year; *afterwards* B. *gave a Bond* for the ſame Money; *Per Holt at Niſi Prius*, It is a Queſtion if the Bond be void or not.

(F) In what Caſes a Forfeiture of treble Value ſhall be incurred on Account of Uſury. *

* See the foregoing Head.

Hawk. P.C. 247. ſ. 12. 1. THOUGH the Receipt of higher Intereſt than is allowed by the Statute, by virtue of an Agreement ſubſequent to the firſt Contract, does not avoid an Aſſurance fairly made and agreeable to the Statute, yet it ſubjects the Party to the Forfeiture of treble Value.

Hawk. P.C. 247. ſ. 14. 2. But the Receipt of Intereſt before the Time when it is in Strictneſs due, being voluntarily paid by the Debtor for the greater Convenience of the Creditor, or for any other ſuch like Conſideration, without any Manner of corrupt Practice, or any previous Agreement of this Kind at the making of the firſt Contract, does not make the Party liable to the Forfeiture of the treble Value.

Raym. 196. The King v. Allen. 3. An Information upon the Statute 12 *Car.* 2. *c.* 13. ſet forth that the *Defendant*, 16 November 20 Car. 2. *lent J. S.* 20l. *till* June *next following, and that afterwards*, (viz.) *Ad finem termini prædict'* he *took* of the ſaid J. S. *corrupte & extorſive*, 30 s. *for the Loan* thereof, which is more than the Statute allows. The Jury found againſt the Defendant. And it was moved, that this corrupt Agreement ought to be within the Statute at the making the Contract, and not at the End of the Term, as laid in the Information. *Twiſden* J. took a Difference upon the two *Clauſes in the Statute*, that if the *Lender contracts for more*, ſo that the Agreement is corrupt at the Time of the Loan, all the *Aſſurance is void*; *but if he contracts for no more* than the Statute allows, *but will afterwards take more*, the *Aſſurance ſhall not be avoided, but the Party ſhall forfeit the treble Value.* But Judgment was ſtayed till the other Side moved, becauſe the Court would adviſe.

Saund. 294. Ferral v. Shaen. 3 Salk. 390. pl. 4. S. P. accordingly. 4. In Debt upon Bond the Defendant pleaded, That *after the making the Bond the Defendant corruptive recepit* ſo much, *viz.* more than the Statute allows, and that therefore the Bond was void. But adjudged upon Demurrer, that the Plea is not good; for *the Bond* here was not for the Payment of Money (upon or for Uſury) as the Words of the Statute are; but *for any Thing appearing to the contrary*, it *was for Payment of a juſt Debt, and ſo* the Bond was *good when* it was *made*, and therefore an uſurious Contract after, cannot make it void; but it is a Forfeiture of the treble Value by the latter Clauſe of the Statute.

Raym. 197. The King v. Allen. 5. *A.* (when Money was at 8 *l. per Cent.*) lends Money and takes Bond for the ſame, and then the Statute 12 *Car.* 2. is made, and he will *continue the Intereſt on that Bond*, the Bond ſhall not be avoided by ſuch Acceptance of Intereſt, but the Party ſhall forfeit the *treble Value* by the Statute; *per Twiſden* J.

3 Keb. 142. pl. 13. Radly v. Manning. 6. So in Debt on an Obligation conditioned to pay by a certain Day; the Defendant *pleaded the Statute* 12 Car. 2. *c.* 13. *and ſaid that the Contract was Uſurious*; but *Per Cur.* the Contract being *made after the Bond forfeited to receive Intereſt according to the Penalty*, which was double the Principal

Principal, it doth not void the Obligation that was good at firſt, but only ſubjects the Taker to other Penalties; and Judgment for the Plaintiffs, *Niſi*.

(G) In what Caſes Relief is given againſt uſurious Contracts.

1. IT has been ſaid, that though the Statute does not go ſo far as to make the Party receiving the uſurious Intereſt liable to refund; yet having prohibited the taking beyond ſuch a Sum, and avoided the Contract, the taking it is a Breach of the Statute, and the actual Receipt of the Money will (in a Court of Equity) make him liable to refund; the Wrong being the ſame, whether the uſurious Intereſt hath been actually paid or Not. Thus— Caſes in Equ. in Lord Talbot's Time, 114. Proof *v.* Hines.

2. Where *A.* entered into a *Bond* to *B.* for a Sum of Money, *to pay* 6 l. *per Cent.* Intereſt; afterwards *A.* being unable to pay off the Bond, *conſented to pay* 10 l. *per Cent.* for the Money, *and continued paying at that Rate for* 14 *Years*. *B.* died, *A. became a Bankrupt*. The Aſſignees of *A.* brought a Bill, and thereupon the *Executors of B. were decreed*, by the Maſter of Rolls, *to account*; and that, for what had been really lent, legal Intereſt ſhould be computed and allowed, and what had been paid more ſhould be deducted out of the Principal to be due on the Account; *and if* B. *had received more than what was due with legal Intereſt, the ſame to be refunded* by the Executors, and the Bond to be delivered up. And afterwards the Lord Chancellor affirmed the Decree; but ſaid, he did not determine how it could be, had all the Securities been delivered up; that not being before him. Caſes in Equ. in Lord Talbot's Time 38. Boſanquett *v.* Daſhwood.

3. The Court decreed Money to the Plaintiff againſt the Defendant; albeit he had Judgment and Execution, being upon the Point of uſurious Contract. Toth. 231. Longford *v.* Barnard.

4. A *Woman reſorted to Gaming-Places at Court, and by ſupplying Perſons of Quality there with Money, made great Profit; for which Purpoſe ſhe borrowed much Money, and gave the Lender great Rewards* from Time to Time; but *afterwards ſhe borrowed more*, and being arreſted for this laſt Money *gives Bond and Judgment* for it, and then brings a Bill to be relieved againſt the Security, and to have an Allowance for the former exceſſive Premiums which he had given, and to bring the Defendant to an Account. The Defendant's, by Anſwer, confeſſed the Receipt of five or ten Guineas for the Loan of ten Guineas for a Week or ten Days; but *inſiſted that the Sums ſo received were paid as Profit*, and not towards Satisfaction of the Money lent. The Court ordered the Plaintiff to pay Principal, Intereſt and Coſts at Law, and here, or the Bill to be diſmiſſed with Coſts; for that it would not interpoſe, or meddle with *Play-Debts*, or Things of this Kind. *Per* Lords Commiſſioners. 2 Vern. 170. pl. 156. Taylor & *al'* *v.* Bell, Bagnall & *al.*' Ibid. 173. Lord Hutchins ſaid, that if the Sureties had not been Plaintiffs as well as the Woman, he would not have relieved even againſt the Penalty. Lord Chancellor in the Caſe of Boſanquet *v.* Daſhwood, ſaid, that as to the Laws relating to Gaming, the Court would not interpoſe, becauſe Gameſters on both Sides are equally guilty, and in ſuch Caſes the Court will ſtand Neuter; but the Borrower and Lender are not in the View of Gameſters. MS. Rep.

Skin. 411. pl. 7. Tomkins v. Barnet. 1 Salk. 22. S. C. though said to be *Coram* Treby Ch. J. and that Treby Ch. J. allowed, that where a Man pays Money on a Miſtake in an Account, or where one pays Money under or by a meer Deceit, it is reaſonable he ſhould have his Money again; but where one knowingly pays Money upon an illegal Conſideration, the Party that receives it ought to be puniſhed for his Offence; and the Party that pays it is *Particeps criminis*. And there is no Reaſon that he ſhould have his Money again; for he parted with it freely, and *volenti non fit Injuria*.

5. Upon a Truſt at *Guildhall*, in an *Indebitatus Aſſumpſit* for Money received to the Uſe of the Plaintiff, the Caſe was, The Plaintiff was *Co-obligor* with *J. S.* to the Defendant, and between *J. S.* and the Defendant there was an *uſurious Contract*; the *Plaintiff paid Part* of the Money to the Obligee, and after *pleaded the Statute of Uſury* upon this Bond; and this is judged an uſurious Bond; upon which he brought this Action for the Money, which he paid before the Bond was proved Uſurious; and the Queſtion was if the Action lay: And *Holt*. Ch. J. ſeemed to incline ſtrongly that it did not lie; for here there was a *Payment actually made* by the Plaintiff to the Defendant, *in Satisfaction* of this uſurious Contract; and if they will make ſuch Contracts, they ought to be puniſhed; and he was not for encouraging ſuch Kinds of *Indebitatus Aſſumpſits*; for it is like to the Caſe of Bribes, and he who receives them ought to be puniſhed, but he who gives them ought not to be encouraged by any Way to recover his Money again.

Vin. Abr. Tit. Uſury 315. cites MS. Tab. Tit. Uſury, Jan. 24, 1424. Brand v. Cumming.

6. It is ſaid, that Defendant is not obliged to *diſcover* any uſurious Contract, unleſs the Plaintiff offers to wave the Penalty.

(H) How far Sureties are affected by uſurious Contracts.

2 Le. 166. pl. 200. Baſſet v. Frowe.

1. *B.* Was bound with *P.* as his Surety to *J. S.* in a Bond of 500 *l.* and that Bond was upon a corrupt and uſurious Contract againſt the Statute, and *P.* was bound unto the Plaintiff in a Bond, as a *Counter-Bond, to ſave the Plaintiff harmleſs* from the ſaid Bond of 500 *l.* *B.* is ſued by *J. S.* upon the ſaid Bond, and ſo damnified: And thereupon *B.* ſued *P.* upon the Counter-Bond, who pleaded the Statute of Uſury, pretending that all Aſſurances depending upon ſuch uſurious Contracts are void by the Statute. But by the Opinion of *Wray* Ch. Juſt. the ſame is no Plea; for *the Statute is*, that *all Bonds, collateral Aſſurances*, &c. *made for the Payment of Money lent upon Uſury*, ſhall be utterly void; but *the Bond here*, upon which the Action is brought, *was not for the Payment* of the Money lent, *but for the Indemnity of the Surety*.

Cro. Eliz. 642. pl. 43. Button v. Downham 2 And. 121. pl. 65. S. C. accordingly: But it is there ſaid that the Plaintiff did not know of the corrupt Bargain; Noy 73. S. C. by the Name of Downham v. Butter, and Judgment for the Plaintiff. But it is added, that Glanvil ſaid it would be a dangerous Precedent to avoid the Statute. For the Surety may be a Friend of the Uſurers, who will not plead the Statute in an Action of Debt brought againſt him, and ſo the Statute would be to little Purpoſe. And after the Judgment given for the Plaintiff, Glanvil ſaid that that Judgment would be quickly carried to Cheapſide.

2. So likewiſe in Debt on *Bond to ſave the Plaintiff harmleſs from an Obligation* wherein he and the Defendant were bound to *W.* &c. *and from all Suit concerning the ſame*. The Defendant pleaded the Statute of Uſury, and that it was made upon a corrupt Agreement between him and *W.* which the Plaintiff might have pleaded in Debt againſt him by *W.* But the Court held the Plea ill; for though the firſt Obligation were void, yet the ſecond Obligation is forfeited, becauſe the Defendant hath not ſaved him harmleſs from Suits concerning it, nor does the Defendant anſwer thereto, but to the Obligation only.

3. But

3. But where, in Debt on Bond, Defendant *pleaded, that he himself borrowed* 100*l. of* W. *paying for the Forbearance exceſſive Uſury, and the Plaintiff was his Surety for the Payment, and that the Obligation upon which the Action is brought was given* by him to the Plaintiff *to indemnify him againſt* W. *Manwood* held this a good Bar; for when the Plaintiff was impleaded upon the Principal Bond, he might have diſcharged himſelf upon this Matter, and therefore his Laches ſhall turn to his Prejudice; and therefore the Iſſue was joined upon the exceſſive Uſury. 3 Le. 63. pl. 93. Potkin's Caſe.

4. So likewiſe in Debt upon an *Obligation to ſave the Plaintiff harmleſs* from an Obligation, wherein the Plaintiff, as Surety for the Defendant, was bound to *J. S.* to pay 100*l.* the *Defendant ſaid the Obligation* made to *J. S. was upon an uſurious Contract*, &c. *and concludes* ſic non Damnificatus. *Tanfield* ſaid, the Plea is good, or otherwiſe the Statute would be defrauded; for by a *Compact*, the Uſurer would ſue the Surety, who ſhall pay him, and have his Remedy on his Counter-Bond. But all the Court held it no Plea; for he muſt take Care to ſave his Surety harmleſs. And adjudged for the Plaintiff. Cro. Eliz. 588. pl. 22. Robinſon *v.* May. There is a Note added, that the Reaſon conceived was, that *the Surety by Intendment cannot know of the corrupt Contract to plead it in Avoidance of the Bond*, and therefore the Principal ought to take Care thereof. *Ibid.*——*Goldſb.* 174. pl. 107. S. C. held accordingly *per tot Cur'*. But the Reporter adds, *ſed Quære.*

(I) What Informations will lie in Caſes of Uſury, and where they are good, and where not.

1. AN Information was moved for againſt *Cawket* a Pawn-broker for taking Sixpence a Pound *per* Month Intereſt; which was ſaid to be extravagant Uſury. The Court however thought there was nothing ſo enormous in this Offence but that the common Method of Puniſhment would be ſufficient. But it was argued, that the Statute of Uſury allows the Penalty for Uſury to be recovered by Information, or Action, and that was urged as a Reaſon, why the Court ſhould grant it. But the Court ſaid, that was to be underſtood only of an Information *qui tam*. And farther obſerved, that the Statute chalking out a particular Method of proceeding for a new Offence, was a farther Reaſon why the Court could not grant an Information; neither can the Party be ſo much as indicted. 1 Bern. Rep. in K.B. 209. Anon'.

2. The *Place where Defendant accepted* exceſſive Intereſt ought to be ſhewn in the Information, but not the Place where the *Contract for the Loan* or forbearing was made; for that is not needful: But *per Clerk* J. and *per Gent.* J. and *Manwood* Ch. B. the Place where the corrupt Bargain was made muſt certainly be alledged. Le. 96. pl. 125. Sir Wollaſton. Dixy's Caſe. An Informationupon the Statute of Uſury, for a *Contract with Perſons unknown*, recipiendo ultra 10*l. in the Hundred*, was held ill becauſe an *Informer, who is not Party*, although the Contract was *ultra* 10*l.* &c. *per Cent. ſhall not have any Benefit unleſs there was a Receipt of the Uſury according to the Contract.* And for that the *Recipiendo* is naught, becauſe there is *no Place nor Time put of the Receipt*, which is now traverſable in that Information. *Noy* 143. Naſie's Caſe.

3. The Information likewiſe muſt *ſhew whoſe Money* it is; *Per Manwood* Ch. B. Le. 97. Sir Wollaſton Dixy's Caſe.

4. If an Information be exhibited in the Exchequer againſt an Uſurer, and charges that he took more than 10*l.* in the 100*l.* without *ſhewing how much* Arg. 2 Le. 39. pl. 52. Martin Van Henbeck's Caſe.

much, ſuch Information is utterly inſufficient; for the Informer ought to ſet forth the Quantity of the Intereſt received, and yet the ſame is not to be recovered.

And. 48. Topeliff *v.* Waller.

5. Upon an Information on the Statute of Uſury, and Subpœna awarded out of *C. B.* againſt the Defendant, and upon Iſſue joined; and found for the Informer, it was alledged in Arreſt of Judgment, that the Court of *C. B.* is not to hold Plea by *Proceſs* of *Subpœna* but by *Original*, and it is not aided by the Statute of Jeoffails; for it is not miſconceiving of Proceſs, but a diſorderly Award of it; and it was inſiſted likewiſe, that it is *not alledged* in the Information *by whom, or to whom, nor what Sum, or at what Place, nor when the Money was lent, nor againſt the Form of what Statute it is*; yet Judgment was given for the Plaintiff.

Arg. 11 Rep. 58 a. Dr. Foſter's Caſe cites it as adjudged. And. 49. pl. 123. Emmot *v.* Fullwood.

6. But where an Information was exhibited, and ſhewed the uſurious Contract in certain, whereby it appeared that more than 10*l.* was reſerved and received for the Loan of 100*l.* and concluded *contra formam Statuti*, yet becauſe he did not expreſly ſay, that it was *Per corruptam Accommodationem*, according to the Words of the Penal Statute, the Information was adjudged inſufficient.

ſeems to be S. C. and the Juſtices of both Benches held, that thoſe Words ought to be expreſly alledged, and not by Implication; and cited 10 H. 7. c. 10. and for Default of thoſe Words the Judgment was reverſed. The Defendant was *indicted for uſurious Lending* 20*s. ea Intentione* to receive 23*s.* within a Month, *and that the Defendant did receive* 3*s.* for the Loan of 20*s.* which *per Curiam*, is not good *without* ſaying *Quod corrupte agreatum fuit*, and for that Reaſon it was quaſhed, being removed out of the inferior Court. Keb. 629. pl. 111. The King *v.* Gaſt or Garth. *Crooke* J. took a *Diverſity* between an *Information* and a *Verdict*, that *in an Information the Agreement ought to be expreſly alledged to be corrupt*, and cited 11 Rep. Dr. Foſter's Caſe, *and the Book of Entries* 333. But that it is otherwiſe in a Verdict, which is the Finding of the Lay Gents. 2 Roll. Rep. 48. Roberts *v.* Tremoil.

3 Le. 238. pl. 327. Owen Morgan's Caſe.

7. An *Information* upon the Statute of Uſury, for an uſurious Mortgage made, *charged the Defendant, that* cepit ultra 10*l. in* 100*l.* For the Forbearance of one Year, and that was *out of the Iſſues, Rents, and Profits which he took in* Middleſex *of Lands in* Glamorganſhire *in* Wales *mortgaged to the Defendant. Manwood* ſaid, in the Principal Caſe, that the taking of the Iſſues and Profits ought to have been laid where the Land was. And ſuch was the Opinion of the whole Court.

Cro. J. 104. pl. 40. Woody's Caſe. And it was held in this Court, that if the Defendant had demurred upon the Declaration,

8. In Debt upon the Statute 37 *H.* 8. of Uſury, the (Count) was, that he *corruptive lent* 40*l. againſt the Form of the Statute*, and that ſuch a Day he lent him 20*l* &c. *againſt the Form of the Statute*; but (*as to this*) *did not ſay corruptive.* After Verdict for the Plaintiff, it was objected, that he ought not to have Judgment for either of the Sums, it being clearly ill for the 20*l.* for want of the Word (*Corruptive.*) But all the Court held, that being good for Part, he ſhall have Judgment for that Part; for being for ſeveral Sums it is in Nature of two ſeveral Actions.

it had been good for the one, and the Plaintiff ſhould have had Judgment for that Part. Cro. J. 104. in S. C.

Cro. J. 440. pl. 13. Bedo *v.* Sanderſon. Hawk. P. C. 248. c. 82. ſ. 24. ſays, that in pleading an uſurious Contract by way of Bar

9. Information in the Exchequer, for that the Defendant *Per viam corruptæ Barganiæ received*, &c. After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, becauſe he *did not ſet forth what the Bargain was*, but generally, *Per viam corruptiæ*, &c. *Sed non Allocatur*; for this is *the uſual Courſe of the Exchequer, and the Bargain is to be given in Evidence.* But it was agreed that *in Pleading to avoid a Bond* or Aſſurance, *it ought to be particularly ſet forth*, becauſe *the Party is Privy* to his own Contract, but the Informer is not; and therefore it is ſufficient for him to ſhew it particularly in Evidence.

to an Action, you muſt ſet forth the whole Matter eſpecially, becauſe it lay within your own Privity; but that in an Information on the Statute for making ſuch a Contract, it is ſufficient to ſet forth the corrupt Bargain generally, becauſe Matters of this Kind are ſuppoſed to be privily tranſacted; and ſuch Information may be brought by a Stranger.

10. An

10. An Information set forth *that the Defendant, by way of a corrupt Contract, cepit & ad Lucrum suum convertit* 40*s. for deferring* the Day of *Payment of* 25*l.* from *the* 29*th of* July *to the* 30*th of* May, (the Day on which he took the 40*s.*) *Contra formam Statuti.* After a Verdict it was moved that it did *not appear that the* 25*l. was Money lent, but it appears that the taking* the 40*s. was after Lending, and there is no corrupt Agreement laid, either before or at the Time of Lending.* But adjudged against the Defendant; for though it be not well laid so as to give Judgment against the Defendant upon the Statute 12 *Car.* 2. *c.* 13. to pay treble the Money lent, yet it is found that by a corrupt Agreement he took so much, and therefore gave Judgment against him at Common Law, *viz.* Fine and Imprisonment. Sid. 421. pl. 9. the King *v.* Walker. Vent. 38. Anon seems to be S. C. says, it was moved that the Time of Forbearance was past, and the Party might give what he pleased in Recompence for it, there being no precedent Agreement to inforce him to it. *Sed non allocatur*; for the Court said they would expound the Statute strictly; and if Liberty were allowed in this Case, the Brokers might oppress the People exceedingly, by detaining the Pawn, unless the Party would give them what they please to demand for the Time after Failure of the Payment.

11. It has been held, that *No Indictment will lie* on the Statute of Usury; for the Method the Act prescribes must be followed; therefore the Indictment must be quashed. 11 Mod 174. pl. 17. The Queen *v.* Dy.

(K) Of the Pleadings in Cases of Usury.

1. IN pleading an usurious Contract by way of Bar to an Action, you must set forth the whole Matter especially, because it lay within your own Privity; but in an Information on the Statute for making such a Contract, it is sufficient to set forth the corrupt Bargain generally, because Matters of this Kind are supposed to be privily transacted, and such Information may be brought by a Stranger. Hawk. P.C. 248. s. 24.

2. Where the Statute is not pleaded, the Bond, though Usurious, is good. 3 Salk. 391. pl. 7.

3. But it has been held, that Usury cannot be pleaded to *Scire Facias* on a Judgment. 2 Str. 1043. Bush and Others, Assignees of Jones *v.* Gower.

4. An usurious Contract was pleaded in Bar of Debt upon a Bond, but it was not said that Defendant was indebted to Plaintiff at the Time of the Bond given, or that there was an Agreement to lend Money upon the usurious Contract; and for that *Jud' nisi pro Quer'*. 12 Mod. 385. Crow. *v.* Brown.

5. Likewise after a Verdict *pro Rege* on an Indictment for Usury; it was moved in Arrest of Judgment, that they had only laid a corrupt Agreement, without any Loan or taking excessive Interest in Pursuance of it. And Judgment was arrested. 2 Str. 816. The King *v.* Upton.

6. Upon Usury pleaded to an Action against Defendant as Indorser of a Note for 200*l.* the Case was, that one *Grace* took the Note upon advancing 197*l.* when the Note had three Months to run, and at the three Months End took another Note for 200*l.* upon advancing 3*l.* for other three Months. It was insisted, that this was not Usury, being a Purchase out and out of the Notes: And both Parties becoming Bankrupts, and the Commissioners refusing to let these Notes be proved, a Petition was preferred to the Lord Chancellor, who directed an Issue upon them. And now *Lee* Chief Justice held, that this was Usury within the Meaning of 2 Str. 1243. Massa *v.* Dauling.

the Statute 12 *Ann. c.* 16. which prohibits the taking more than 5*l. per Cent.* upon any Contract directly or indirectly: However he left it to the Jury upon the Queſtion, whether this was to be deemed a Purchaſe or a Loan; who found it to be the latter, and the Defendant had a Verdict.

2 Show. 329. pl. 339. Henton *v.* Roſſee. 7. In Debt on Bond Defendant pleads *Quod corrupte agreatum fuit*, that Intereſt ſhould be paid for it *about the Rate of* 6*l. per Cent.* Plaintiff demurs, and held good; for that the *Plea* ſhews not *what* Intereſt, nor that the *Bond was for the very Money*, but only by Intendment; (to wit) *ſuper Agreement prædicto* the Bond was given; and ſays not expreſly *Pro eadem Pecunia*. Judgment *Pro Quer'*. For that they would not eaſily avoid a Bond, and the corrupt Agreement ought to be ſpecially and particularly ſet forth, and the *Quantum* of Intereſt, otherwiſe the Plaintiff can never tell what to anſwer.

6 Mod. 303. Villars *v.* Cary. 8. In Error of a Judgment in the Palace-Court, wherein the Plaintiff *declared that the Defendant became indebted to him by Bond in the Sum of* 107*l.* The Defendant, without claiming Oyer, *pleaded that he was indebted truly to the Plaintiff in* 92*l.* 5*s.* 9*d. and that by Way of corrupt Agreement for the Forbearance* of that Sum for a *Year*, *this Bond was given*, &c. The Plaintiff replied, *That the Bond was given* pro vero & juſto Debito, and *traverſed the corrupt Agreement*. And upon Demurrer to this Replication, it was inſiſted that it was ill, becauſe the Plaintiff did *not ſhew how much the juſt Debt was*. *Sed non allocatur*; for there was ſufficient to induce the Traverſe; and if it had been alledged, you could not have traverſed the Inducement, and the Declaration ſufficiently ſhews the Debt.

Freem. 264. pl. 286. Booth *v.* Cook. 9. In Debt upon a Bond, Defendant *pleaded* the Statute 12 *Car.* 2. of Uſury, and ſaid, *that corrupte agreatum fuit, that he ſhould pay more than* 6*l. per Cent.* The Plaintiff replied *Quod non corrupte agreatum fuit*, and held a good Replication; for if by *Miſtake of the Writer* the Money was made payable without any corrupt Agreement, it is not uſurious within the Statute.

Fitz. Gibb. 130. pl. 2. Baynhan *v.* Matthews. 10. The Plaintiff declares upon a *Promiſſory Note for* 30*l.* dated 4th *Feb.* The Defendant *pleads that it was corruptly agreed* between him and the Plaintiff, *that he ſhould pay* unto the Plaintiff 45*s. for the Loan* of the ſaid Sum of 30*l. for three Months*; and then ſets out the laſt Statute againſt Uſury, *&c.* It was excepted to this Plea, that it was *not averred that the Note was given ſubſequent to the late Act againſt Uſury*. To which it was anſwered and reſolved by the Court, that by the Date of the Note it appears to be ſo.

Freem. 367. pl. 472. Taylor *v.* Herbert. 11. In an *Indebitatus Aſſumpſit for* 10*l. and a Computaſſet for* 35*l.* in the ſame Declaration. The *Defendant pleads the Statute of Uſury* to the *Indebitatus*, and *avers that both the Indebitatus and* the *Computaſſet were for the ſame Cauſe of Action*. It was reſolved, that the Averment was naught; for the Ground of the *Indebitatus* is the Debt, and the Ground of the *Computaſſet* is the Account; and ſo it cannot be averred that there is the ſame Cauſe of both, eſpecially as it is here, where one is for 10*l.* and the other for 35*l.* But *Hale* ſaid, he ſhould have pleaded the Statute to the *Indebitatus*, and then that afterwards they came to an Account for the ſame Wares, *&c.*

Sid. 285. pl. 21. Dande *v.* Currer. 12. On Demurrer in Debt it appeared that 500*l.* was lent upon Articles dated the 8th of *March*, to be paid at ſuch a Time; and in the mean Time *to pay* 15*l. half yearly from* November *before*. For Cauſe of Demurrer it was ſhewn, that it appeared by the Declaration that the Contract was Uſurious; but it was anſwered, that the Defendant ought to have pleaded that *corrupte agreatum fuit*, *&c.* and ſo gave the Plaintiff an Opportunity to reply to it. But *upon Reading the Articles it was, Whereas Money*

Money was lent, &c. which might be in *November*, or before; and therefore Judgment was given for the Plaintiff.

13. Debt was brought on a Bill to pay 7 *l.* the first of *May*, and on *Default* of Payment to pay 3 s. 4 d. *for every Month* that it shall be in Arrear after *May the first*. Defendant made no Averment that the Agreement was to pay the 3 *s.* 4 *d.* for every Month *pro Lucro Intereſſe & Diem dando Solutionis*, but only with a *Sic* the said Sum exceeded 8 *l. per Cent.* whereas he should have averred that the same did exceed 8 *l.* upon the 100 *l.* those being the effectual Words in the Statute. Judgment *pro Quer.* Sir. W. Jo. 409. pl. 2. Swailes v. Bateman.

14. In Debt on a Bond for 100 *l.* dated the 12th *July*, &c. conditioned *to pay* 54 *l.* at *six Months End.* The Defendant pleaded the Statute 21 *Jac.* of Usury. The Plaintiff replied that he lent the Defendant 50 *l.* on the 12th of *July*, &c. for a Year, and that the Defendant was to pay for it 4 *l.* for the Forbearance of one Year, and that the Plaintiff was not to demand it till the End of the Year; *but* that *by Miſtake of the Scrivener it was made but for Half a Year, which he not knowing accepted it.* The Defendant *rejoined that the Lending was only for Half a Year*, and that he was to pay 4 *l.* for it for that Time, *abſque hoc, that on the ſaid 12th of* July *it was agreed that the Loan ſhould be, or that he ſhould forbear it for a whole Year.* Upon Demurrer it was objected that the Plea was ill, becauſe it was *not pleaded, that corrupte agreatum fuit, &c.* And ſo the Court, *abſente Bramſton*, held: And they all held the Allegation, againſt the Words of the Condition to be good; for it is only ſhewing the true Agreement; but they all held the Rejoinder ill, becauſe in the Traverſe the Defendant had made the Day, (*viz.* 12th *July*) Parcel of the Iſſue, when he ſhould only have traverſed the Agreement. But no Judgment was given, becauſe the Parties agreed. Cro. Car. 501. pl. 1. Neviſon v. Whitley.

15. The Defendant borrowed 200 l. *of the Plaintiff*; and *it was agreed* between them *that he ſhould pay the* 200 l. *at ſuch a Day, and* 20 l. *for the Intereſt for one Year, and that certain Lands ſhould be conveyed to the Plaintiff, upon Condition that if the Money was paid at the Day, then the Grant ſhould be void.* The Defendant *pleaded the Statute of Uſury, and averred that the Land was worth* 12 l. *a Year, and ſo he had double Uſe. The Plaintiff replied, that upon the borrowing the* 200 l. *it was agreed that the Defendant ſhould have the Profits of the Land until Breach of the Condition, and traverſed* that there was *an Agreemeut that he ſhould have the Profits, and alſo* 20 l. *for Intereſt.* And upon a Demurrer it was objected, that the Replication was ill, becauſe the Land being conveyed to the Plaintiff, by conſequence the Profits are ſo too; and therefore he cannot aver *a verbal Agreement againſt the Deed*, that he had not the Profits. But the Plaintiff had Judgment. Roll. Rep. 41. pl. 8 Dodd v. Ellington.

16. *Tanfield* Ch. Baron ſaid, that upon an Information betwixt PARAMORE *v.* ROBINSON in *B. R.* where *ſeveral Contracts upon Uſury being alledged, Iſſue was joined whether* it were *corrupte agreatum Modo & Forma prout.* It was reſolved by all the Juſtices of *England* to be an ill Iſſue; for he ought to have traverſed the Agreements, becauſe they were ſeveral. Cro. J. 544. pl. 4. Heath v. Dauntley.

17. In Debt on Bond the Defendant *pleaded the Statute* of Uſury *made 6th of* Feb. 13 Eliz. *(whereas the Parliament began 2d* Feb. 13 Eliz.) The Plaintiff replied, that it was not made for Uſury *Contra formam Statuti Modo & forma prædict'.* Though both Parties agree that there is ſuch a Statute, yet the Court knowing that there is not, and that therefore it cannot be *contra formam Statuti*; the Court held that no Judgment could be given for the Plaintiff; and it being in the Bar of the Defendant, the Court held it clearly ill, and that there ſhould be a Repleader. Cro. E. 245. pl. 4 Love v. Wotton.

18. In *Caſe, &c.* upon a ſpecial Promiſe, the Plaintiff *ſet forth that he was poſſeſſed of ſeveral Pieces of Hammered Money*, &c. *and that the Defendant in Conſideration the Plaintiff would pay that Money, being in Number and Tale* 300 l. *he promiſed to repay* 300 l. *of New Money, together with* 41. 10s. Lutw. 271, 273. Yeoman v. Barſtow.

more for the Intereſt of every 100*l. for eight Months*, &c. *and then declares upon an* Indebitatus Aſſumpſit *for* 313*l.* 10*s.* After Verdict, it was moved that the Contract was Uſurious, it being to pay 4*l.* 10*s.* for the Intereſt of 100*l.* for eight Months: But *per tot. Cur.* Judgment was given for the Plaintiff. It was agreed, that if it had appeared by the Plaintiff's own Declaration that the Contract was Uſurious, and could not be otherwiſe, Judgment ought to be given againſt him; but that it *does not appear here that the Contract muſt neceſſarily be Uſurious; and the Jury having found it* Aſſumpſit, *the Court would not intend Uſury*, but the contrary. And *Powell* J. obſerved that the Conſideration of the Promiſe here is, *viz.* that the ſaid Plaintiff would *pay* to the ſaid Defendant the ſaid 300*l.* ſo that here *is no Loan*, without which there can be no Uſury; and they would not intend a Loan, unleſs the Jury had found one.

3 Salk. 391. pl. 7. cites Lutw. Grange's Caſe.

18. The Defendant, *in Conſideration of* 12*l.* paid him by the Plaintiff, gave *Bond to pay* the Plaintiff 14*l. if he lived ſix Months after* the Date of the Bond. There was a Plea and Demurrer, and it was objected, that it appears by the very Condition of this Bond, That the Contract was Uſurious, it being to pay 14*l.* for 12*l.* in ſix Months after the Date of the Bond; though this might have made the Bond void, in caſe the Statute had been pleaded, yet, that not being done, this Objection comes too late.

(L) Of the Trial and Evidence in Caſes of Uſury.

1. BY 13 *Eliz. c.* 8. *ſ.* 3. *Juſtices of* Oyer *and* Terminer, *of Aſſize, and of Peace, in their Circuits and Seſſions, and Mayors, Sheriffs and Bailiffs of Cities, have Power to hear and determine all Offences committed againſt* 37 *H.* 8. 9.

Le. 148. pl. 206. Kinnerſly *v.* Smart.

2. It has been held that the Trial ſhould be where the Contract was, and not where the Bond was made.

Cro. Eliz. 195. pl. 10. S. C. accordingly; for the Bond is confeſſed, and the Point is whether it be made by Uſury, which was alledged to be where the Trial was.

Hardr. 420. Anon.

3. In an Action *tam quam*, &c. *in the Exchequer*, for taking more than 6*l. per Cent. Contra formam Statuti.* After Verdict for the Plaintiff, it was *moved* in Arreſt of Judgment, *that it lies not in this Court for Uſury committed in* London, *though it would lie upon the Statute of* 21 *Jac'*; and in Truth the Intereſt taken here was more than 10*l. per Cent':* And by the general Concluſion of *contra formam Statuti*, it ſhall be intended againſt the Form of that Statute which allows the largeſt Intereſt, and there are four Statutes againſt Uſury, one of *H.* 8. which allows 10*l. per Cent.* another of *Q. Eliz.* which allows 8*l. per Cent.* a third of K. *Ja.* and a fourth of *Car.* 2. which allows but 6*l. per Cent.* And by the Statute of *Ja.* 1. *c.* 4. there ſhall be no Suit upon a Penal Statute, but as therein directed, which does not extend to the Court of Exchequer, unleſs the Offence is done in *Middleſex*. But *per Hale* Ch. B. The Offence laid in the Information being for taking more Intereſt than 6*l. per Cent.* ſhall be taken to be grounded upon *that Statute that prohibits taking more than* 6*l. per Cent.* and that the Law *gives the Suit in no Court in particular*, and therefore it may well be proſecuted here; though if a particular Court had been named, as in 21 *Ja.* it would be otherwiſe. The Court took Time to adviſe.

4. An

4. An Indictment was brought at the Seſſions before the Juſtices of the Peace at *Hicks's Hall* for Uſury *contra formam Statuti*; and Judgment was againſt the Defendant, upon which a Writ of Error was brought in *B. R.* and the Judgment reverſed; for the Juſtices of the Peace have no Juriſdiction in this Caſe. 2 Salk. 680. pl. 1. The Queen *v.* Smith. 2 Ld. Raym. 1144. S. C. 3 Salk. 188.

The King *v.* Bakeſtraw. And in the Caſe of the King *v.* Pexley, it was admitted by the Counſel that moved, that upon the Statute of Q. Eliz. which prohibits the taking above 10 *l. per Cent.* the Juſtices of Peace at Seſſions have Juriſdiction; but inſiſted that they have not upon any of the later Statutes. 2 Barnard. Rep. in B. R. 143. The King *v.* Pexley.

5. If an *Information* be brought *againſt* two, upon the Statute of Uſury, and *one only is found guilty*, no Judgment can be given in this Caſe. *Arg.* to which the Court agreed. Lane 19. Page's Caſe.

6. In an Information upon the Statute of Uſury, the Defendant pleads *Nil Debet*. The Jury find an uſurious Receipt, but do *not find any Loan*. A new *Venire Facias* ſhould be awarded, and not a new *Niſi Prius*. Jenk. 283. pl. 13. 8 Rep. 65. Loveday's Caſe.

7. Uſury *ſhall not be intended unleſs the Jury find it* expreſly. Arg. Bridgm. 112. Webb and Jucks *v.* Worfield cites 10 Rep. 56.

8. With Reſpect to the Law concerning *Evidence* in Caſe of Uſury, it has been ruled, that he who hath agreed to pay Money upon an uſurious Contract, ſhall not be admitted to give Evidence upon an Information againſt the Uſurer, unleſs he have paid off the whole Debt; for by ſuch a Means a Man might avoid his own Act and Deed. Hawk. P C. 249. ſ. 27.

9. Alſo an Information for an uſurious Contract on a Loan of Money, cannot be ſupported by Evidence of ſuch a Contract on a Bargain concerning Wares ſold. Hawk. P C. 249. ſ. 28.

10. In a *qui tam* on the Statute of Uſury, the Chief Juſtice refuſed to let the Party to the Contract be a Witneſs to prove the Repayment of the Money, becauſe till that was proved he was no Witneſs at all. *Strange pro defendente.* 1 Str. 633. Shank, *qui tam*, *v.* Payne.

11. On a Motion for Leave to plead double, the Court declared, that on *non Aſſumpſit* the Defendant might give in Evidence an uſurious Contract, becauſe that makes it a void Promiſe; but in the Caſe of a Specialty, it muſt be pleaded. And on the Trial the Defendant was admitted to that Evidence upon the general Iſſue, and the Plaintiff was nonſuit. 1 Str. 498. Ld. Barnard *v.* Saul.

WAGER

WAGER of LAW.

1. WAGER of Law is a particular Mode of Proceeding, whereby in an Action of Debt * brought upon a Simple Contract between the Parties, without Deed or Record, the Defendant † may discharge himself by swearing in Court in the Presence of Compurgators, ‡ that he oweth the Plaintiff nothing in Manner and Form as he hath declared. And this waging his Law, is sometimes called *making* his Law.

* Actions of Debt are the most common Cases in which Defendant may wage his Law;

but he may likewise wage his Law in Actions of *Detinue*, and other Cases, as also in real Actions, as will appear in the Course of this Title. † In some Cases however, the *Plaintiff* may wage his Law, See Letter E. ‡ According to some the Compurgators should be eleven in Number, for which Reason every Wager of Law, is said to counter-vail a Jury, as the Defendant must wage his Law, *de duodecimo manu*, that is by himself and Eleven more. Others hold *Twelve* to be necessary: But according to some, less than eleven will suffice. The Defendant is sworn absolutely *de fidelitate*, and the Compurgators *de Credulitate*, that is, that they believe what he swears to be true. 33 H. 6. f. 8. 1 Inst. 295. 2 Shep. Abr. 190. 2 Vent. 171. Anon.

N. B. It has been said that Compurgators are not absolutely necessary unless the Plaintiff demands them. 2 Keb. 360. Puckridge *v.* Brown.

2. For the better understanding of this Title, which is now in a great Measure obsolete,* it will be necessary to consider the following Heads.

* When a Defendant has waged his Law it is a perpetual Bar to the Plaintiff's Demand, for the Law presumeth that no Man will forswear himself: But Mens Consciences, as Lord Coke observes, are grown so large, especially in this Case which passes with Impunity, (since no Indictment for Perjury lies in Wager of Law) that it is now become Customary, instead of bringing Actions of Debt, to bring Actions upon the Case upon the Defendant's Promise, wherein he cannot wage his Law. 1 Inst. 295. 1 Vent. 296.

Actions of *Detinue* likewise are now seldom brought, Actions of *Trover and Conversion* having taken Place in their Stead, where the Conversion changes the *Detinue to an Action on the Case*.

(A) The Reason for allowing the Wager of Law.
(B) The Manner of waging Law.
(C) At what Time Law may be waged.
(D) In what Cases Law may be waged, and in what not.
(E) What Persons may wage their Law.
(F) Against whom Wager of Law lies.
(G) In what Cases the Defendant is barred from waging his Law, by having examined the Plaintiff or his Attorney.

(A) The

(A) The Reaſons for allowing the Wager of Law.

1. THE Reaſon wherefore in an Action of Debt upon a ſimple Contract, the Defendant may wage his Law, is, for that the Defendant *may ſatisfy the Party in ſecret*, or before Witneſſes, and all the Witneſſes may die, ſo the Law doth allow him to wage his Law for his Diſcharge; and this is peculiar to the Law of *England*, and no Miſchief iſſueth hereupon; for the Plaintiff may take a Bill or Bond for his Money; or if it be a ſimple Contract, he may bring his Action upon his Caſe upon his Agreement or Promiſe, which every Contract executory implieth, and then the Defendant cannot wage his Law. 2 Inſt. 45.

2. It had been ſaid however, that the *only true Reaſon of* Wager of Law is the *Inconſiderableneſs of the Ground of the Plaintiff's Demand*, and it ſuffices that the Nature of the Defendant's Diſcharge be of equal Validity with the Ground of the Plaintiff's Charge; *Per Hatſel* Juſt. 12 Mod. 670. The City of London *v.* Wood. It is an Argument, ſays *Hatſel* J. that the Matter is of no great Value that the Plaintiff did not take Care to have better Security for it than the ſlippery Memory of Man, and the Uncertainty of a verbal Contract; ſo that ſince the Tie was ſo ſlight, it is no Wonder if the Law will ſlightly diſcharge it.

3. *Originally* it was *not only a Privilege of the Defendant* to diſcharge himſelf, but one which the *Plaintiff* had when he had no Witneſs of his Debt, to put the Defendant under a Neceſſity of giving him his Oath to diſcharge himſelf; ſo it was a Kind of Equity in Law, that the Plaintiff might put him to take his Oath that he owed nothing to him, or confeſs the Debt, rather than the Plaintiff ſhould loſe his Debt, in Caſes where he had no Witneſſes of it at all, or had ſome who were then dead; *Per Holt* Ch. Juſt. 12 Mod. 678. The City of London *v.* Wood.

4. The Plaintiff's bare Affirmance was formerly ſufficient to put the Defendant to wage his Law; but it is provided by *Magna Charta*, that "No Bailiff ſhall put any Man to his Law, nor to an Oath, upon bare ſaying without Witneſſes brought in." Before this, as has been premiſed, the Plaintiff, on his Declaration on bare Affirmance, might make the Defendant ſwear there was nothing due. At this Day, if the Plaintiff produce Witneſſes to prove his Demand, the Court may put the Defendant to wage his Law; and in ſuch Caſe the Defendant is not at Liberty to croſs examine, no more than where the Plaintiff in a Prohibition produces Witneſſes to prove his Suggeſtion. 2 Salk. 683. Mood *v.* The Mayor of London.

(B) The Manner of waging Law.

1. THE Manner of *Waging of Law* is thus: He that is to do it, muſt bring ſix Compurgators with him into Court, and ſtand at the End of the Bar towards the right Hand of the Chief Juſtice; and the Secondary aſks him, whether he will *wage his Law?* If he anſwers that he will, he lays his right Hand on the Book, then the Judges admoniſh him and his Compurgators to be adviſed, and tell them the Danger of taking a falſe Oath; and if they ſtill perſiſt, the Secondary ſays, and he that *wageth his Law* repeats after him: *Hear this ye Juſtices, That I* A. B. *do not owe to* C. D. *the Sum of*, &c. *nor any Penny thereof in Manner and Form as the ſaid* 2 Lill. Abr. 824. 2 Vent. 171. Anon'. 2 Salk. 682. Anon'.

ſaid C. D. *hath declared againſt me: So help me God.* The Compurgators then ſeverally make Oath that they believe he ſwears truly. But before the Defendant takes the Oath the Plaintiff is called by the Crier thrice; and if he do not appear he becomes nonſuited, and then the Defendant goes quit without taking his Oath; and if he appear, and the Defendant ſwears that he owes the Plaintiff nothing, and the Compurgators do give it upon Oath that they believe he ſwears true, the Plaintiff is barred for ever; for when a Perſon has *waged his Law*, it is as much as if a Verdict had paſſed againſt the Plaintiff: If the Plaintiff do not appear to hear the Defendant perform his Law, ſo that he is nonſuit; he is not barred, but may bring a new Action.

(C) At what Time Law may be waged.

3 Bulſt. 316. And the Defendant cannot afterwards wave it without the Plaintiff's Conſent, and betake himſelf to the Country, and upon his Non-appearance a *Defecit de Lege* was entered. Bulſt. 186. Harriſon *v.* James.——But there is a Caſe where after the Roll was marked with a *Defecit de Lege, and Coſts aſſeſſed*, it was moved and prayed, *Sedente Curia*, that the Defendant might be demanded again, and it was granted, and then Defendant made his Law. Noy 42. Anon'.

1. *DAY given* for waging of Law is peremptory; *per* three Juſtices againſt one.

2. Where the Defendant wages his Law *inſtanter*, that is, the ſame Term without Day given over, the Plaintiff need not be called: Conſequently cannot be nonſuited. Thus—

Sid. 366. Buckeridge *v.* Brown. The Reporter ſays *Vide* that when Defendant comes *Inſtanter* to wage his Law, or at another Day in the ſame Term, to which the Plaintiff has imparled, the Plaintiff ſhall not be demanded, nor can he be nonſuited. Ibid. cites 14 H. 4. c. 19. b. 3 H. 6. c. 50. a. S. C. 2 Keb. 360. by the Name of Puckeridge *v.* Brown.

3. In Debt by Aſſignees of Commiſſioners of Bankrupts, Defendant came in and *waged his Law Inſtanter*, and it was debated if the Plaintiff might be nonſuited; and at length it was agreed, in as much as the Defendant came *Inſtanter*, that the Plaintiff cannot be *nonſuited*; for which Reaſon the *Plaintiff was not called*, but the Defendant waged his Law; and ſo the Plaintiff was barred.

Br. Ley Gager, pl. 85. cites 3 H. 4. c. 2. Brooke Tit. Nonſuit, pl. 10. S. C. ſays that if he had imparled to the Law, ſuch Imparlance ought to be to another Term.

4. But in *Debt*, where the *Defendant tendered to make his Law immediately that he owed nothing*, &c. becauſe the Plaintiff appeared in Court, it was awarded that the Defendant ſhould make his Law; and this was the Folly of the Plaintiff; for *he might have imparled to the Law, and then at the Day he might have been nonſuited*; But *Brooke* makes a *Quære*, if he may be nonſuited at another Day in the ſame Term.

Br. Ley Gager, pl. 96. cites 3 H. 6. c. 49.

5. So in Debt the Defendant tendered his Law, and the *Plaintiff imparled to a Day in the ſame Term*; there the *Plaintiff ſhall not be demanded, nor be nonſuited*; for his Appearance was of Record the ſame Term, and if he refuſes the Law he ſhall be barred.

2 Lill. Abr. 845.

6. It is ſaid that the Defendant cannot pray to be admitted to wage Law *Inſtanter*, after Imparlance, but before he may, and then the Plaintiff cannot be nonſuit, if the Defendant perfect his Law; but if he wage his Law after Imparlance, the Plaintiff may be nonſuit.

Br. Ley Gager, pl. 91. cites 5 H. 4. c. 5.

7. In Debt, the Defendant waged his Law, and when he came to perform it *the Plaintiff ſaid, that he who now came is another of the ſame Name*, for

for his Action is againſt *J. S. the Elder*, and he who now appears is *J. S. the Younger*, and prayed his Judgment; *Quære*, for the Averment was not granted nor denied.

8. In Debt, the Defendant had *Day given* to wage his Law, and *at the Day Defendant was ſick of a burning Fever*, whereupon the Court was moved for another Day for the Defendant to come and wage his Law, and offered to make all this good by an Affidavit; but the Court refuſed, and adviſed him to plead to the Country, and ſo he did. 3 Bulſt. 263. Smink. v. Barker.

9. In *Debt upon Arbitrement* the *Defendant imparled*, and *came back the ſame Term, and tendered his Law*; and *per Cur.* he ſhall have his Law. Br. Ley Gager, pl. 41. cites 8 H. 6. c. 10.

10. So in *Detinue*, the *Defendant pleaded in Bar, and after relinquiſhed it and waged his Law*, and well; for a Man may relinquiſh his Plea, and plead the general Iſſue, and this ſhall be before the Plea entered. Br. Pleadings, pl. 119. cites 2 E. 4. c. 13.

11. In a *Præcipe quod reddat*; the Tenant came *at the Grand Cape* and waged his Law of *Non ſummons*, and at the Day, *&c.* came to make his Law, and the *Demandant offered to wave the Default, and prayed that the Tenant may plead in Chief*; *per Finch*, you cannot do ſo unleſs the *Tenant* will conſent to it; and the *Tenant* was thereof demanded, and *would not conſent*, therefore he waged his Law, and the Demandant took nothing by his Writ; but *at the firſt Day when the Tenant offered his Law, the Demandant might have releaſed the Default*, as it ſeems. Br. Ley Gager, pl. 82 cites 42 E. 3. c. 7.

12. In a *Præcipe quod reddat*, where *Eſſoign is caſt for the Tenant at the Summons returned, and* by his Default *Grand Cape iſſued*; there he cannot wage his Law of Non-ſummons at the Day, unleſs he *ſurmiſes that the Eſſoign was not caſt by him.* Br. Ley Gager, pl. 90. cites 36 H. 6. c. 23. And ſee 10 H. 6. c. 9. that if he had ſo ſurmiſed he might wage his Law. Ibid.

(D) In what Caſes Law may be waged, and in what not.

1. WAGER of Law is *allowable in five Caſes.* 1ſt. In *Debt* upon *ſimple Contract*, which is the Common Caſe. 2d. In *Debt upon an Award* upon a *Parol Submiſſion.* 3. In *an Account againſt a Receiver* for Receipts by his own Hands. 4th. In *Detinue*, though the Bailment were by the Hands of another. 5th. In *an Amerciament in a Court-Baron* or other inferior Courts not of Record; and in every of theſe Inſtances, the Action is grounded on a feeble Foundation, and of ſmall Conſideration in Law.. *Per Hatſell* Juſt. 12 Mod 670. The City of London v. Wood.

2. It is to be obſerved likewiſe, that there is a Wager of Law of Non-ſummons in Actions real, as where upon Summons againſt a Tenant, he Wages his Law, ſaying, that he was not ſummoned according to the Law of the Land. Thus— Note. This Summons muſt be on the Tenant's Land, and if againſt an Heir, muſt be on the Lands, which did deſcend; or on default, the Tenant at the Grand Cape, may wage his Law of Non-ſummons.

3. If Summons in *Præcipe quod reddat* be not ſerved 15 Days before the firſt Day of the Return of the Writ, the Tenant may wage his Law of Non-ſummons; for fifteen Days before the fourth Day of the Return will not ſerve. Br. Ley Gager, pl. 57. cites 24 E. 3. c. 46.

So

Br. Ley Gager, pl. 27. cites 50E. 3. c. 16. And per Belk. the *Vouchee*

4. So it is ſaid in Writ of *Deſceit*, that if the Sheriff returns *in Præcipe quod reddat, that the Tenant is ſummoned by* J. N. *and* J. C. *where he was not ſummoned but by one of them*, the Tenant may wage his Law, *that he was not ſummoned according to the Law of the Land. Per Fulthorp.*

in Præcipe quod reddat ſhall not wage his Law, *that he was ſummoned upon the Summons*; for he need not ſave his Default at the *Grand Cape ad Valentiam*; *But if he be returned ſummoned, where he was not ſummoned, and after Grand Cape ad Valentiam* iſſues, he ſhall have *Deſceit* of the Return, *&c.* Ibid.

12 Mod. 679. The City of London *v.* Wood.

5. But in 33 *H.* 6. *c.* 8. in a *Præcipe quod reddat*, the *Tenant made default*, but appeared on the Return of the Grand *Capias*, and *pleaded Non-ſummons*, and would conclude to the Country, where the proper Trial was, by Wager of Law of Non-ſummons; and the Queſtion there was, if he could wave his Plea of Wager of Law, and betake himſelf to a Plea concluding to the Country? And the better Opinion there is, that he could not put himſelf upon his Country, and decline this Wager of Law; and that Caſe is plainly out of the Statute of *Magna Charta*, becauſe it is not Debt, nor *Simplex Loquela*, but a Proceſs of Non-ſummons, from which he was to ſave himſelf. *Per Holt* Ch. J.

Br. Ley Gager, pl. 103. cites 1 E. 5. c. 2.

6. It has been ſaid that a Man may wage his Law of *Non-ſummons in Re-ſummons*, as well as he may in the Original; *per Brian* and *Chocke*; but *per Cateſby contra. Quære*; and the Writ was returnable 15 *Trin.* and the *Summoners ſummoned him about the 15th of* Corpus Chriſti; and therefore, *per Chocke*, he may wage his Law of Non-ſummons, that he was not ſummoned according to the Law of the Land; for the Law is, that he *ſhall be Re-ſummoned by the Day in the Writ*; but *Cateſby* ſaid, that he cannot wage his Law here by Conſcience, nor can he wage his Law in Re-ſummons.

7. Where Things are Part real and Part perſonal, the Defendant may wage his Law ſometimes for the whole, and ſometimes for Part only, Thus—

2 Roll. Abr. 108.

8. In *Detinue of a Box with Charters* and Muniments, if the Plaintiff *Counts not of any Charters in particular*, the Defendant may wage his Law of the whole, 19 *H.* 6. 9. Becauſe before the ſhewing of it, the Box and all in it but a Chattel.

Id. Ibid.

9. If Detinue be brought *for a Cheſt ſealed, with Money and Charters of Land in it*, the Law lies of the whole.

Id. Ibid.

10. But otherwiſe it is if he *declares of certain Charters in particular*, and if the *Writ be not that the Cheſt was ſealed.*

Id. Ibid. In ſuch Caſe the Defendant waged his Law as

11. In Detinue of certain Charters and Muniments contained in a Cheſt, if Plaintiff declares of one Charter in particular, the Defendant may wage his Law of the Reſidue.

to all but this particular Charter, and did it immediately; and the Reaſon ſeems to be, that when it is in a Cheſt incloſed, the Charters are of the Nature of the Cheſt which is only a Chattel; *contra* of Charter ſpecial; for of this he cannot wage his Law, becauſe it *concerns Franktenement.* Br. Ley Gager, pl. 61. cites 14 H. 6. c. 1.

1 Inſt. 295. a.

12. But in *no Caſe where* a *Contempt, Treſpaſs, Deceit or Injury is ſuppoſed in* the *Defendant*, he ſhall wage his Law; becauſe the Law will not truſt him with an Oath to diſcharge himſelf in thoſe Caſes.

12 Mod. 671. Civit. London *v.* Wood.

13. Likewiſe where the *Matters charged are Facts notoriouſly known*, in ſuch Caſe there are no Precedents of Wagers of Law. *Per Hatſell* Juſt.

And *per Holt* C. Juſt. The *Secrecy of the Contract*, which raiſes the Debt, is the Reaſon of the Wager of Law; *But* if the Debt *ariſe from a Contract* that is *notorious*, there ſhall be no Wager of Law. In Debt upon a *Contract for a Sum in Groſs*, Wager of Law will lie; *But* if Debt be brought *for Rent* due *upon a Parol Leaſe*, it will not lie; and the Reaſon is, becauſe it is in the Realty, and ariſes from the taking of the Profits of the Land, and Occupation of it in the Country, and ſo the Notoriety of the Thing excludes the Defendant from waging his Law. Ibid. 681.

14. Agreeable

14. Agreeable hereto it was ſaid by *Holt* Ch. J. that in Account, if the Receipt was by the Defendant, the Defendant may wage his Law, but not if by the Hands of a third Perſon:* It is true, the Law is otherwiſe in Detinue on a Bailment; for though the Bailment was by the Hands of a third Perſon, the Defendant may wage his Law; but here the Bailment is not traverſable, but the Detainer, and that is the Point of the Action, and the Delivery might be private. 2 Salk. 683. Mood v. The Mayor of London. * Becauſe the Receipt is traverſable in this Action,

2 Roll. Abr. 109. and *becauſe it appears* from the Nature of the Action, *that a third Perſon can prove the Receipt per Holt* Ch. J. 12 Mod. 679. but in Account *by the Baron of Receipt by the Defendant, by the Hands of the Feme of the Plaintiff*, the Defendant may wage his Law; for the Baron and Feme are one Perſon in Law; and therefore it is an immediate Receipt of the Plaintiff himſelf. Br. Ley Gager, pl. 54.

15. By the 4 & 5 *Annæ* 16. it is enacted, that Actions of *Account* may be brought *againſt a Bailiff or Receiver*, for receiving more than his juſt Share, and an Action of *Account was brought* upon this Statute, *againſt Defendant, as Bailiff ad Merchandizandum*, who waged his Law; and upon Demurrer, it was objected that Wager of Law would not lie againſt a Bailiff *ad Merchandizandum*; *but if* Action had been brought *againſt a Receiver*, and *Plaintiff did not ſhew by whoſe Hands*, there Wager of Law would lie; and ſo it was adjudged in this Caſe for the Plaintiff. 8 Mod. 303. Page v. Barns.

16. There is no Act of Parliament in expreſs Words, which takes away Wager of Law in Action of Debt upon Arrearages of Account; but at the Common Law the Defendant ſhall have his Law in Action of Debt, brought upon Arrearages of Account, whether the Account be before one Auditor, or many, as appears in 38 *H.* 6. *f.* 6. *a.* But the *Reaſon why the Defendant ſhall not wage his Law when the Account is made before Auditors, is upon the Statute of Weſt.* 2. *c.* 11. for now this Statute *has made the Auditor's Judges of Record*, becauſe they are impowered thereby to commit the Defendant to Priſon, which none can do but Judges of Record. 10 Rep. 103. a. in a Nota of the Reporter, in Alfride Denbawd's Caſe.

17. Alſo when the Matter of the Charge is pregnant with Matter of Law, there ought to be no Wager of Law, for that were to ſwear to the Law; as in Debt againſt Huſband for Cloaths taken up by the Wife, the Huſband ſhall not wage his Law; becauſe it is a Point of Law, whether he be liable or no, *viz.* Whether the Cloaths were for neceſſary Apparel of the Wife, without which he is not liable. 12 Mod 671. Civit. London v. Wood.

18. In Debt on an Arbitrament (it is intended where the Submiſſion is by Parol) the Defendant may wage his Law; becauſe, though the Arbitrators, who are Strangers, are concerned, yet the Submiſſion might be ſecret; and that is the Foundation from whence the Debt ariſes. 2 Salk. 683. Mood v. The Mayor of London.

19. In Debt for an Amerciament in a Court-Baron, the Defendant may wage his Law; the Reaſon is, becauſe the Matter is of ſmall Value which concerns the Lord only; tranſacted in *Pais* which might be without his Knowledge: But in Debt on a Judgment in a Court-Baron, the Defendant cannot wage his Law; for the Judgment could not be but by Confeſſion or Verdict, and it was in a proper Court; all which the Defendant cannot by his bare Oath falſify; and the Authorities to the contrary are not Law; and ſo it is in Debt on a Judgment in a Court of Antient Demeſne. Id. ibid.

20. In Debt for Rent on a Leaſe-Parol, the Defendant cannot wage his Law, becauſe his Occupation is notorious, which is a better Reaſon than becauſe it ſavours of the Realty; and ſo it is in Account againſt a Bailiff for the ſame Reaſon, his Management and Tranſaction being notorious. Id. 684.

21. In Debt brought by a Gaoler againſt his Priſoner for Meat and Drink, the Defendant *per Holt* cannot wage his Law, not becauſe the Gaoler is obliged to find him Victuals; that is not true, as appears by *Plowd.* 68. *a.* but becauſe the Defendant is in Durance, and the Plaintiff cannot take Security from him for Repayment; for a Bond will be void, ſo that he muſt be content with a Promiſe: And he did not deny the Caſe of 9 *Rep.* 87. *b.* 88. *a.* which was Debt by a Labourer; it is but juſt that Id. ibid.

the

* The Master shall not wage his Law, because the Labourer is compellable to serve by the Statute; but it is otherwise if he be not retained according to the Statute. 1 Inst. 295. a.

the Plaintiff should prove he was retained, rather than that the Defendant should be put to wage his Law. *

9 Rep. 87. b. Pinchon's Case.

22. But if a Victualler or Common Innkeeper bringeth an Action for his Guest's Victuals delivered to him, the Guest may wage his Law; for a Victualler or Inn-keeper is not compellable to deliver Victuals till he be paid for them in Hand: And therewith agreeth 10 *H.* 7. *c.* 8. *a.*

2 Salk. 684. Mood *v.* Mayor of London.

23. In Debt on a Bye-Law made by a Company, the Defendant in a Case cited to be in *B. R.* about two Years before, waged his Law; but *Holt* Ch. Just. said it was, because the Counsel for the Plaintiff did not challenge it; for he wondered at it then; but this is not so strong as Debt on a Bye-Law by a Corporation; for this obliges all Strangers without Notice; but the other only their own Members, till Notice: And the Chief Justice denied the Case in *Co. Ent.* 118. and the Case 2 *Ro. Abr.* 106. *pl.* 9.

4 Rep. 95. b. in Slade's Case. 12 Mod. 671. The City of London *v.* Wood.

24. Wager of Law lies not *in Quo Minus*, because the *King's Revenue* is remotely concerned, upon Suggestion, that the Plaintiff is indebted to the King, and less able to pay him by the Defendant's Detainer of his Debt. *Per Hatsell* Just. who said this was given as a Reason, in *Slade's* Case.

1 Inst. 295. a.

25. In Debt upon a Penalty given by Statute, the Defendant shall not wage his Law.

12 Mod. 671. cites Br. Ley Gager, 94.

26. The very *Custom of London* excludes Wager of Law in some Actions, as in *Debt for Diet*, 1 *E.* 4. *c.* 6. *Bro. Examination*, 18. the Statute of 38 *E.* 3. *c.* 5. before which no Wager of Law could be against a Londoner. *Per Hatsell* Just.

12 Mod. 683. The City of London *v.* Wood.

27. So a *Prescription* prevents Wager of Law, and no Man can deny it upon Oath. *Per Holt* Ch. Just.

2 Vent. 261. Mayor, &c. of London *v.* Dupester. 2 Lev. 106. S. C. by Name of Mayor, &c. of London *v.* Deputee.

28. Wager of Law was denied in *Debt for Scavage* arising by *Prescription*, and that confirmed by Act of Parliament.

Vent. 261. The Mayor, &c. of London *v.* Depuster.

29. In Debt for a *Duty* growing by a Bye-Law; if the *By-Law* be *authorized by Letters Patent*, no Wager of Law lies.

Vent. 261. cites 20 H. 7.

30. *So* in Case for *Toll* granted by Letters Patent.

In Action of Debt for Toll by *Prescription*, you cannot wage your Law; *per* Hale Ch. J. who asked if they could shew a Precedent where a Man can wage his Law in an Action brought upon a Prescription for a Duty. 1 Mod. 121. pl. 26. Draper *v.* Bridewell.

2 Mod. 141. Beaumont *v.* ———.

31. Where a Person of Quality intending a Marriage with a Lady, presented her with a Jewel, and the Marriage not taking Effect, he brought an Action of *Detinue* against her, and she taking it to be a Gift, offered to wage her Law; the Court was of Opinion, that the Property was not changed by this Gift, being to a special Intent, and therefore would not admit her to do it.

(E) What Persons may wage Law, and what not.

1. AN Alien ſhall wage his Law in that Language he can ſpeak. 1 Inſt. 295. a.

2. A Man outlawed, or attainted in an Attaint, or upon an Indictment of Conſpiracy, or Perjury, or otherwiſe, whereby he becomes infamous, ſhall not wage his Law. Id. Ibid.

3. A Man under the Age of twenty-one Years, ſhall not wage his Law; but a Feme Covert together with her Huſband ſhall wage her Law. Id. Ibid.

The Reaſon why an Infant cannot wage Law, is ſaid to be becauſe he cannot take an Oath. 11 H. 6. 40.

4. Whereſoever a Man is charged as Executor or Adminiſtrator, he ſhall not wage his Law, for no Man ſhall wage his Law of another Man's Deed. Id. Ibid.

5. *So* where *two* ought to have their Law, and *one is under Age*, both ſhall be ouſted; becauſe the Infant cannot, and both ought to join in Plea. 11 H. 6. f. 40. b.

6. A Man who is *Dumb and not Deaf*, may wage his Law *of Non-ſummons*, and make it, and ſhew his Aſſent by Signs. Adjudged. 18 E. 3. f. 53.

7. In an *Account* if the Defendant before *Auditors pleads Payment, or other Things given in Satisfaction*, the *Plaintiff may wage his Law* of it, though he be Plaintiff 30 E. 3. f. 4. b.

8. *Tenant who is ſummoned by one Summoner where there ought to be two, may wage his Law* of Non-ſummons, according to the Law of the Land; but the *Vouchee ſhall not wage his Law of Non-ſummons* upon the Writ of Summons. Br. Diſceit, pl. 11. cites 50 E. 3. c. 16.

9. In *Formedon againſt a Feme* who made Default, and *Grand Cape* iſſued returnable 15 *Mich.* before which Day *ſhe took Baron*, and at the Day appeared and waged her Law of *Non-ſummons*; and the Feme made her *Law alone without her Baron*, and the Writ abated. Br. Ley Gager, pl. 32. cites 12 H. 4. c. 24.

10. He who is *attainted of any Falſity*, *or* is *perjured*, ſhall not wage his Law. Br. Ley Gager, pl. 81. cites 33 H. 6. c. 32. per Litt.

11. In *Account*; the *Defendant* upon his Account, *alledged Tallies of the Plaintiff, by which he had received certain of the Money*, and the *Plaintiff waged his Law, that they were not his Tallies*; and it was admitted; and ſo ſee that the *Plaintiff* may wage his Law, and by it ſhall charge the Defendant. Br. Ley Gager, pl. 20. cites 21 E. 4. c. 49.

12. A *Bailiff* may not wage his Law, but a *Receiver* may. Cro. Eliz. 790. Shyfield v. Barnfield. Per Holt. Ch. J. The Reaſon the Book gives is, becauſe it is in Reality, which is as much as to ſay, becauſe it is notorious to the Country; Becauſe the Country takes Notice of his looking after the Manor, and have thereby an Opportunity of knowing that he received the Rents. 12 Mod. 681.

13. *A.* brought *Debt upon a joint Contract, againſt* B. C. D. *and* E. E. *was outlawed*, B. C. *and* D. *appeared by a joint Superſedeas.* B. *tendered his Law*, that he with the reſt did not owe. C. *and* D. *plead Nil debent per Patriam.* It was inſiſted that *B.* ſhould not be admitted to his Law alone, becauſe they were all charged as one Defendant, being for a Joint Debt, and ſo that they muſt all anſwer together. But this was held to be unreaſonable; for if ſo, then by joining others with me, as joint Defendants, I muſt be ſubject to their Plea, though they would confeſs the Action; and though Defendants may not ſever in Dilatories, yet in Bar they may: And after divers Motions and Precedents produced, *B.* was received to his Law, and the Plaintiff nonſuited. Hob. 244. Eſſington v. Bourcher.

(F) Againſt

(F) Against whom Wager of Law lies.

2 Roll. Abr. 110.

1. IN an *Action brought by the Prince of Wales* the Defendant ſhall wage his Law.

Palm. 14. Godfrey and Dixon's Caſe.

2. In Debt brought by *Merchant-Stranger* it lies not.

Br. Ley Gager, pl. 25. cites 49 E. 3. c. 5. A Man cannot wage his Law againſt the King. Br. Ley Gager, pl. 72. cites 50 E. 3. c. 1.—4 Rep. 95. b. in a Nota of the Reporter it is ſaid, that in every *Quo Minus* in the Exchequer, brought by the King's Debtor againſt one who is indebted to him upon ſimple Contract, the Defendant ſhall not have his Law, for the Benefit of the King, as appears in 8 H. 5. Ley 66. 10 H. 7. c. 6. and yet there the King is not Party; *a Fortiori* where ſuch Debt or Duty is forfeited to the King, and he is the Sole and immediate Party.—For *Debt forfeited to the King by Common Law* no *Ley Gager* lies. Cro. C. 187. Morgan *v.* Green.

3. Where one is *indebted by Specialty to a Man attainted*, the King ſhall have it, *&c. contra* if it be without Specialty; for there the Debtor may wage his Law againſt the Perſon attainted; *contra againſt the King*, though it was *upon Contract only*; and therefore he ſhall not be in a worſe Caſe than he was before, and ſo the King ſhall not have the Debt; *per Hamm* and *Holt*, *Quod non Negatur.*

Br. Ley Gager, pl. 102. cites 32 H. 6. c. 24.

4. In a *Quo Minus in Scaccario* againſt him who *uſurped upon the Poſſeſſion of the King which was leaſed to the Plaintiff*, ſo that he could not pay his Farm to the King, the Defendant may wage his Law, as appears in a ſhort Note there, where it is ſaid, that in 4 *E.* 4. it was adjudged, that a Man may wage his Law in a *Quo Minus*; but *contra Anno* 8 *H.* 5. *tit. Ley, pl.* 66. in *Fitz.* which was agreed for Law. 35 *H.* 8.

Noy 112. Oſborne *v.* Bradſhaw, cites 10 H. 7. c. 18.

5. In Debt *by Aſſignee of Commiſſioners of Bankrupts* the Defendant pleaded *Nil Debet*, and waged his Law: And the Court held that he might, though the Intereſt and Power to ſue in his own Name be good to the Plaintiff by the Statute of Bankrupts. But otherwiſe if the Duty itſelf had been originally due by the Statute.

1 Inſt. 295. a.

6. If an *Infant* be *Plaintiff*, the Defendant ſhall not wage his Law.

Sti. 199. Hodges *v.* Jane.

7. An Action doth not lie againſt an *Executor* upon a *Conceſſit ſolvere* of the Teſtator upon a ſpecial Cuſtom, *per Roll.* Ch. Juſt. for this would be to charge an Executor in an Action of Debt, where he may by the Law wage his Law, and an Action of Debt lies not againſt the Executor upon a ſimple Contract made by the Teſtator. *Adjornatur.*

(G) In what Caſes the Defendant is barred from waging his Law, by having examined the Plaintiff or his Attorney.

1. THE Defendant's Right of examining the Plaintiff, or his Attorney, is founded on the 5 *H.* 4. *c.* 8. by which it is provided, That

If before this Statute a Man had entered into an Account before two Auditors for a Thing which lay not in Account, and they found him indebted, upon which the other brought Writ of Debt againſt him, it was no Plea for the Defendant, that the Matter lay not in Account; for it was his Folly to enter into the Account; and ſo at the Common Law the Defendant was without Remedy. But now by this Statute he may tender his Law, and pray that the Party be examined, whether it lies in Account or not, and if it be found that it does not, the Defendant ſhall make his Law and go his Way; but by the Common Law, the Defendant ought to anſwer to the Debt, which is the End of the Account, and the Judgment of the Auditors, and the Matter of Account, is only Conveyance, *Per* Frowike Kelw. 82. b. pl. 3.—It ſeems, by the Meaning of this Statute of the Examination of the Attorney of the Plaintiff in Debt upon Arrearages of Account before Auditors, *the Wager of Law does not lie*, *but* that *Nihil debet per Patriam* ſhall be received in Debt upon Arrearages of Account before Auditors. *E contra*, 50 E. 3. againſt *Gealer*, *for Eſcape of one condemned before Auditors aſſigned.* Dy. 145. pl. 63. Wiſe's Caſe.

2. *To eſchew Miſchiefs which be as well within* London *as other Places, of that diverſe fained Suits of Debt have been taken by the People of the ſaid*

Places

Places againſt diverſe People, ſurmiſing that they have accounted before their Apprentices, and ſometimes other their Servants, Auditors aſſigned, of diverſe Receipts, Duties and Contracts, had betwixt them, and that they were found in Arrearages upon the Account in diverſe great Sums, where there was never Receipt nor Duty betwixt ſuch Parties, to the Intent to make them againſt whom ſuch Suits were taken, to put them in Inqueſt, and to put them from the waging of their Law; the Judges before whom ſuch Actions ſhall be ſued in Cities and Boroughs, ſhall have Power to examine the Attornies, and others, and thereupon to receive the Defendants to their Law, or to try the ſame by Inqueſt after the Diſcretion of the Judges.

2. In Debt upon Arrears *of Account*, the *Defendant tendered his Law and prayed that the Plaintiff be examined*, and *ſo he was, and ſaid* upon Oath *that it is as he has counted*, by which the Defendant was compelled to anſwer without his Law: And ſo ſee that where the Defendant prays that the Plaintiff be examined or ſworn, this is peremptory to the Plaintiff in this Point, and ſo is the *Ley Gager* of the Part of the Defendant, and ſo is the Oath of the Plaintiff in *London* by the Cuſtom, where if the Defendant prays that the Plaintiff ſhew his Declaration, and he does ſo, there the Defendant by this ſhall be condemned. Br. Examination, pl. 18. cites 19 H. 6. c. 43.

3. So in *Debt upon Arrears of Account*; Defendant *prayed that the Plaintiff's Attorney be examined if the Matter lies in Account*, and ſo he was, notwithſtanding that no Iſſue was tendered; and upon Examination of the Attorney, *it appeared that it was for Stuff bought by the Defendant of the Plaintiff*, for which he tendered his Law and was admitted. Br. Examination, pl. 15. cites 14 H. 4. c. 19. If the Attorney refuſes to be examined, the Defendant ſhall be admitted to his Law. Br. Examination, pl. 33. cites 33 H. 6. c. 24.

4. In *Debt by two Executors*, who *counted of Arrears of Account made in the Time of their Teſtator*; the *Defendant tendered his Law*, that he owed them nothing, and *prayed that they be examined*; and the Opinion of the Court was that they ſhall not be examined of another's Deed; *contra of an Attorney*; for he may have Information of his Maſter, *&c.* And the Cauſe of this Examination given by the Statute is, that if it be *found upon Examination of the Party* upon a Book *that the Matter does not lie in Account*, then the Law lies; and ſo this Caſe is out of the Caſe of the Statute of Examinations, by the Opinion of the Court. Br. Examination, pl. 5. cites 3 H. 6. c. 46. S. P. Br. Examination, pl. 6. cites 9 H. 6. c. 8. S. P. Ibid. pl. 7 cites 9 H. 6. c. 58. Where Executors bring Action, or where Action is brought againſt them, *Examination does not lie*; for this is to have the *Ley Gager*, and *Executors cannot wage their Law*, Br. Examination, pl. 22. cites 20 E. 4. c. 3. *per Brian* and *Littleton*.—*Debt by an Executor upon Arrears of Account before Auditors in the Time of the Teſtator*, the Defendant tendered his Law and prayed that the Plaintiff be examined, and *the Executor was examined*, though it was of another's Deed, *but not preciſely*, whether he ſaw or heard of the Account, or was preſent at it; *but whether any Matter which proves that it lay in Account, came to his Hands, and of other Points at the Diſcretion of the Juſtices*, but *not of the Truth of the Deed preciſely*; and upon the Examination it was awarded, that the Defendant anſwer without his Law; *quod Nota*. Br. Examination, pl. 19. cites 21 *H.* 6. c. 54, 55.—*But* if *ſuch Action* was *brought againſt an Executor*, the *Plaintiff ſhall be examined*. Ibid.

OF

OF WARRANTY.

1. A Warranty (concerning Freeholds and Inheritances) * is a Covenant real annexed to Lands or Tenements, whereby a Man and his Heirs are bound to warrant the ſame, and either upon Voucher, or by Judgment in a Writ of *Warrantia Chartæ*, to yield other Lands and Tenements to the Value of thoſe that ſhall be evicted by a former Title, or elſe it may be uſed by way of *Rebutter*.

1 Inſt 365. a.
* There are alſo Warranties of Goods and Chattels upon Contracts; but Warranties of Lands, &c. only are here ſpoken of.

☞ For Warranties of Goods and Chattels, ſee Vol. 1. P. 50. Tit. *Actions on the Caſe*, Letter (E.)

2. For the better Conſideration of this Subject, * we ſhall reduce it under the following Heads, under which we ſhall examine—

* Lord *Coke* ſays, that the Learning of Warranties is one of the moſt curious and cunning Learnings of the Law, but the Subtilty out of this Learning is, as will be ſhewn, greatly abridged by the Statute Law.

(A) The ſeveral Kinds of Warranties.
(B) To what Things a Warranty may be annexed.
(C) What Words and Clauſes in a Deed will make a Warranty.
(D) What ſhall be deemed a good Warranty in Deed.
(E) What ſhall be deemed a good Warranty in Law.
(F) Of the Nature of a lineal Warranty, and how far it ſhall bind.
(G) What ſhall be deemed ſufficient Aſſets to make a lineal Warranty a Bar.
(H) Of the Nature of a collateral Warranty at Common Law, and how far it ſhall bar.
(I) Of the Alterations introduced by the Statute Law.
(K) What ſhall be deemed Warranties by Diſſeiſin, Abatement or Intruſion.
(L) Of the Effects of Warranty in Deed.
(M) What Uſe may be made of a Warranty in Deed.
(N) Who may take Advantage of a Warranty, and againſt whom.
(O) When a Warranty ſhall be ſaid to be defeated, determined, ſuſpended or avoided.
(P) How Warranties ſhall be expounded.

(A) The

(A) The ſeveral Kinds of Warranties.

1. WARRANTIES in their more general Diviſions are of two Kinds,

2. Firſt, a Warranty in Deed, or an expreſs Warranty, which is when a Fine or Feoffment in Fee, or a Leaſe for Life is made by Deed, which has an expreſs Clauſe of Warranty contained in it, as when a Conuſor, Feoffor or Leſſor, covenants to warrantthe Land to the Conuſee, Feoffee or Leſſee. 1 Inſt. 365.

3. Secondly, a Warranty in Law, or an implied Warranty, which is when it is not expreſſed by the Party, but *tacite* made and implied by the Law.

4. A Warranty in Deed is either lineal or collateral.

5. A lineal Warranty is a Covenant real, annexed to the Land by him who either was Owner of or might have inherited the Land, and from whom his Heir lineal or collateral might by Poſſibility have claimed the Land as Heir from him that made the Warranty. 1 Inſt. 370.

6. A collateral Warranty is made by him that had no Right, or Poſſibility of Right to the Land, and is collateral to the Title of the Land.

7. Alſo there is a Warranty which commences by Diſſeiſin or Wrong. Lit ſec. 698.

8. Warranties likewiſe may be ſaid to be either *general*, *viz.* by one and his Heirs to another and his Heirs; or *particular*, and reſtrained to a certain Perſon.

(B) To what Things a Warranty may be annexed.

1. A Warranty may not only be annexed to Freeholds, or Inheritances corporeal, which paſs by Livery, as Houſes and Lands; but alſo to Freeholds or Inheritances incorporeal, which lie in Grant, as Advowſons; and to Rents, Commons, Eſtovers, and the like, which iſſue out of Lands or Tenements: And it may not only be annexed to Inheritances in *Eſſe*, but alſo to Rents, Commons, Eſtovers, &c. newly created. As a Man (ſome ſay) may grant a Rent, &c. out of Land for Life, in Tail, or in Fee with Warranty; for though there can be no Title precedent to the Rent, yet there may be a Title precedent to the Land out of which it iſſueth before the Grant of the Rent, which Rent may be avoided by the Recovery of the Land, in which Caſe the Grantee may help himſelf by a *Warrantia Chartæ* upon the eſpecial Matter. And ſo a Warranty in Law may extend to a Rent, &c. newly created; and therefore if a Rent newly created be granted in Exchange for an Acre of Land, this Exchange is good, and every Exchange implieth a Warranty in Law. And ſo a Rent newly created may be granted for Owelty of Partition. 1 Inſt. 366.

2. If a Man ſeized of a Rent-ſeck, iſſuing out of the Manor of *Dale*, taketh a Wife, and the Huſband releaſeth to the Tertenant, and warranteth *Tenementa prædicta*, and dieth, and the Wife bringeth a Writ of Dower of the Rent, the Tertenant ſhall vouch, for that albeit the Releaſe enured by way of Extinguiſhment, yet the Warranty extended to it, and by the Warranty of the Land, all Rents, &c. iſſuing out of the Land, that are Id. Ibid.

ſuſpended or diſcharged at the Time of the Warranty created, are warranted alſo.

1 Inſt. 389. a. 3. But a Warranty doth not extend to any Leaſe, though it be for many thouſand Years, or to Eſtates of Tenant by Statute Staple, or Merchant or *Elegit*, or any other Chattel, but only to Freeholds or Inheritances. And this is the Reaſon, that in Actions which Leſſee for Years may have, a Warranty cannot be pleaded in Bar as in an Action of Treſpaſs, or upon the Statute of 5 *R.* 2. and the like. But in ſuch Actions, which none but a Tenant of the Freehold can have, as upon the Statute 8 *H.* 6. Aſſize, or the like, there a Warranty may be pleaded in Bar.

1 Inſt. 385. a. 4. A Warranty may be made upon any Kind of Conveyance, as upon Fines, Feoffments, Gifts, *&c.* Alſo a Warranty may be made by and upon Releaſes and Confirmations made to the Tenant of the Land, although he who makes the Releaſe or Confirmation has no Right to the Land, *&c.* And yet ſome have holden, that no Warranty can be raiſed upon a bare Releaſe or Confirmation, without paſſing ſome Eſtate, or Tranſmutation of the Poſſeſſion. But the Law is otherwiſe; for if *A.* be ſeized of Lands in Fee, and *B.* releaſeth to him, or confirms his Eſtate in Fee with Warranty to him, his Heirs and Aſſigns, this Warranty is good, and both the Party and his Aſſignee ſhall vouch.

(C) What Words and Clauſes in a Deed will make a Warranty.

1 Inſt. 384. 1. THE Word *Warrantizo*, or Warrant, is the only apt and effectual Word to make an expreſs Warranty, or a Warranty in Deed, and therefore this Word is uſed in Fines.

Id. Ibid. Lit. ſ. 733. 5 Rep. 17, 18. Spencer's Caſe. 2. And the Words *Defendo*, or *Acquitto*, although they are commonly uſed in Deeds, yet of themſelves without the other will not make a Warranty.

1 Inſt. 384. 3. The Words *Dedi & Conceſſi*, or *Dedi* only in a Feoffment make a Warranty, when an Eſtate in Fee or Inheritance paſſes by the Deed.

5 Rep. 18. Spencer's Caſe. 4. But the Word *Conceſſi*, only, or *Demiſi & Conceſſi*, do not make ſuch a Warranty, in the Caſe of a Freehold or Inheritance.

1 Inſt. 384. 4 Rep. 81. Noke's Caſe. 5. And by Force of the Statutes of *Bigamis*, *Chap.* 6. *Dedi* is made an expreſs Warranty during the Life of the Feoffor.

Dyer 42. 1 Inſt. 383. 6. If a Man by Deed warrants Land to *J. S.* and his Heirs, and the Warrantor does not bind his Heirs to the Warrantee; or does not warrant to *J. S.* and his Heirs, but to *J. S.* and his Aſſigns, theſe are good Warranties.

Dy. 42. 7. But if a Man makes a Feoffment in Fee, and Warranty to the Feoffee only, without naming his Heirs, there the Warranty ſhall endure only for Life, becauſe it is taken ſtrictly. And yet if the Feoffee recovers in Value, he ſhall recover Fee Simple, becauſe he loſes Fee Simple.

Id. Ibid. 8. If a Man makes a Feoffment to one and his Heirs, and binds himſelf and his Heirs to warranty againſt all People, and does not ſay with Certainty to whom, nor for how long he will warrant, yet the Feoffee will have a Fee Simple in the Warranty, as he had in the Land: But if the Intent of the Warranty appears plainly by expreſs Words, the Warranty ſhall extend no farther.

(D) What

(D) What shall be deemed a good Warranty in Deed.

1. A Warranty in Deed, or an expreſs Warranty, as has been ſaid, is created only by the Word *Warrant*. And

2. It is to be premiſed that to every good Warranty in Deed, in order that it may bar and bind, theſe following Circumſtances are requiſite.

3. Firſt, That the Perſon that warrants, be a Perſon able; for if an Infant makes a Feoffment in Fee of Land, and thereby binds him and his Heirs to warrant the Land, in this Caſe although the Feoffment be only voidable, yet the Warranty is void. 1 Inſt. 367. b.

4. But if a Man of full of Age and an Infant make a Feoffment in Fee with Warranty, this Warranty is not void in Part, and good in Part; but it is good for the whole againſt the Man of full Age, and void as to the Infant. Id. Ibid.

5. Secondly, That the Warranty be made by Deed in Writing; for if a Man makes a Feoffment by Word, and by Word binds him and his Heirs to warrant the Land; this is not a good Warranty.

6. So if a Man gives Lands to another by his laſt Will, and thereby binds him and his Heirs to warrant it; this Warranty, although the Will be in Writing, is void, becauſe a Will in Writing is no Deed. 1 Inſt. 386.

7. Thirdly, That there be ſome Eſtate to which the Warranty is annexed that may ſupport it; for if one covenant to warranty Land to another, and makes him no Eſtate, or makes him an Eſtate that is not good, and covenants to warrant the Thing granted; in theſe Caſes the Warranty is void. 10. Rep. 96.

8. Likewiſe if the Eſtate to which the Warranty is annexed is determined the Warranty dependant on it is determined likewiſe. Thus if a Man maketh a Gift in Tail, and warranteth the Land to him and his Heirs, and afterwards Tenant in Tail maketh a Feoffment and dieth without Iſſue, he ſhall not rebut the Donor in a Formedon in Reverter, becauſe that the Eſtate to which the Warranty is annexed is determined. Id. Ibid.

9. Fourthly, That the Eſtate to which the Warranty is annexed, be ſuch an Eſtate as is able to ſupport it, and therefore that it be a Leaſe for Life at the leaſt; for if one makes a Leaſe for Years of Land, and binds himſelf and his Heirs to warrant the Land; this is no good Warranty, neither will it have the Effect of a Warranty; but this may amount to a Covenant, on which an Action of Covenant may be brought. 1 Inſt. 378. 5 Rep. 17. Spencer's Caſe.

10. Fifthly, That the Warranty deſcends upon him, that is Heir of the whole Blood by the Common Law to him that made the Warranty, and not upon another; for if Tenant in Tail in *Borough Engliſh* diſcontinues the Tail, and has Iſſue two Sons, and the Uncle releaſes to the Diſcontinuee with Warranty, and dies; this is no good Warranty to bind the younger Son. 1 Inſt. 12. Lit. ſec. 735. Becauſe a Warranty cannot go according to the Nature of Tenements by the Cuſtom, &c. but only according to the Form of the Common Law. Lit. Ibid.

11. So if in this Caſe Tenant in Tail diſcontinues the Tail with Warranty, &c. having two Sons, and dies ſeized of other Lands in the ſame Borough in Fee-Simple, to the Value of the Land in Tail; the younger Son is not barred by this Warranty. 1 Inſt. 12. Lit. 735. and it is there added, that the younger Son ſhall not be barred though Aſſets in Fee Simple deſcend to him from his Father.

Lit. ſec. 718. 12. So if one gives his Land to the eldeſt Son and the Heirs Male of his Body, the Remainder to the ſecond Son, &c. and the eldeſt aliens with Warranty, having Iſſue a Daughter and dies; this is not a good Warranty to bar the ſecond Son.

The Reaſon is becauſe the Warranty deſcended to the Daughter of the elder Son, and not to the ſecond Son. Lit. Ibid.

Lit. 737. 13. So if Tenant in Tail has Iſſue two Daughters by divers Venters, and dies, and they enter, and a Stranger diſſeizes them, and one of them releaſes all her right, and binds her and her Heirs to warrant it; in this Caſe the Warranty is not good to bar the Siſter, becauſe they are of Half Blood only, and the one cannot be Heir to the other according to the Courſe of the Common Law.

1 Inſt. 387. 14. So if two Brothers be by Demi-Venters, and the eldeſt releaſes with Warranty to the Diſſeizor of the Uncle, and dies without Iſſue; this is no good Warranty to bar the younger Brother; for a Warranty, as has been ſaid, muſt deſcend upon him that is Heir at the Common Law to him that made it.

Lit. ſec. 745. 15. Sixthly, It is neceſſary that he that is Heir do continue to be ſo, and that neither the Deſcent of the Title nor the Warranty be interrupted, for if one binds him and his Heirs to Warranty, and after is attainted of Treaſon or Felony, and dies; this Warranty, does not bind his Heir.

Id. 746. 16. So if Tenant in Tail be diſſeized, and after releaſes to the Diſſeizor with Warranty, and after the Tenant in Tail is attainted of Felony, and has Iſſue and dies; this Warranty will not bind the Iſſue.

The Reaſon is for that nothing in this Caſe maketh a Continuance but the Warranty, which cannot deſcend to the Iſſue in Tail, becauſe the Blood between the Iſſue and him that made the Warranty is corrupt. Id. Ibid.

10 Rep. 96. Seymor's Caſe. 17. Seventhly, That the Eſtate of Freehold that is to be barred be put to a Right before or at the Time of the Warranty made, and that he to whom the Warranty does deſcend have then but a Right of the Land; for a Warranty will not bar an Eſtate of Freehold or Inheritance *in Eſſe*, in Poſſeſſion, in Reverſion or Remainder, that is not diſplaced and put to a Right before or at the Time of the Warranty made, though after at the Time of the Deſcent of the Warranty, the Eſtate of Freehold or Inheritance be diſplaced and deveſted.

Id. Ibid. 18. And therefore if there be a Father and Son, and the Son has a Rent-Service, Suit to a Mill, Rent-Charge, Rent-Seck, Common of Paſture, or other Profit Apprender out of Land of the Father, and the Father makes a Feoffment in Fee with Warranty, and dies; this ſhall not bar the Son of the Rent, Common, &c.

The Reaſon is for that the Son was actually ſeized of the Rent or Common at the Time of the Warranty, and he who is in Poſſeſſion needeth not put in his Claim, either to avoid the Fine or collateral Warranty.

Id. Ibid. 19. And although the Son after the Feoffment with Warranty, and before the Death of the Father had been diſſeized, and ſo being out of Poſſeſſion, the Warranty had deſcended upon him, yet this Warranty ſhall not bind him.

Becauſe the Warranty at the Time of the Creation of it did not extend to any Eſtate of Freehold or Inheritance *in Eſſe*.

Id. Ibid. 20. So if my collateral Anceſtor releaſes to my Tenant for Life with Warranty, and dies, and this Warranty deſcends upon me; this ſhall not bind my Reverſion or Remainder.

Id. Ibid. 21. But if in the Caſe before the Son be diſſeized of the Rent, &c. and affirms himſelf to be diſſeized by the bringing of an Aſſize, (for otherwiſe he ſhall not be ſaid to be out of Poſſeſſion of a Rent, or the like) and after

after the Father releaſes with Warranty, and dies; in this Caſe the collateral Warranty ſhall bar and bind the Son of his Rent, &c.

22. And if in the laſt Caſe my Tenant for Life be diſſeized, and my Anceſtor releaſed to the Diſſeizor with Warranty, and dies; this is a good Warranty to bind and bar me. Id. Ibid. Becauſe my Reverſion, as well as the Eſtate of the Tenant for Life, was deveſted at the Time of the Warranty made.

23. Eighthly, That the Warranty does take Effect in the Life-time of the Anceſtor, and that he is bound by it; for the Heir ſhall never be bound by an expreſs Warranty, but where the Anceſtor was bound by the ſame Warranty, and therefore a Warranty made by Will is void. Lit. 734.

24. Ninthly, That the Heir claim in the ſame Right that the Anceſtor does; for if one be a Succeſſor only in Caſe of Corporation, he ſhall not be bound by the Warranty of a natural Anceſtor. 1 Inſt. 370.

25. Tenthly, That the Heir that is to be barred by the Warranty be of full Age at the Time of the Fall of the Warranty; for if the Anceſtor makes a Feoffment, or a Releaſe with Warranty, and the Heir at this Time be within Age, and after he dies, and the Warranty deſcends upon him within Age; this Warranty ſhall not bind him: But if he become of Age after the Warranty of the Anceſtor, and before his Death; in this Caſe the Warranty may bar him, therefore he muſt take Care not to ſuffer a Deſcent after his full Age, before his Entry. 1 Rep. 140. b. Chudleigh's Caſe.

(E) What ſhall be deemed a good Warranty in Law.

1. WARRANTIES in Law are ſo called, becauſe in Judgment of Law, they amount to a Warranty without the Uſe of the Word *Warrant*. Thus 1 Inſt. 384.

2. The Words *Dedi & Conceſſi*, or *Dedi* only in a Feoffment, make a good Warranty in Law, to the Feoffee and his Heirs during the Life of the *Feoffor*. But not againſt the Heir of the Feoffor, for the Heir ſhall not be bounden unto a Warranty made by his Father, unleſs he bind him and his Heirs to Warranty by expreſs Words in the Deed. F. N. B. 134.

3. But the Word *Conceſſi* only in Fine or Feoffment, does not make a Warranty in Law.

4. A Warranty in Law may be good in its Creation, although it be without Deed; for if a Man by his laſt Will and Teſtament deviſes Lands to another Man for Life, or in Tail, rendering Rent; to this Eſtate there is a Warranty in Law annexed. 1 Inſt. 386.

5. And although there be an expreſs Warranty in the Deed, yet this does not take away implied Warranty of the Law. 1 Inſt. 384.

6 Every Partition and Exchange implies in it, and has annexed to it, a ſpecial Warranty in Law. 1 Inſt. 102, 384.

7. If one makes a Gift in Tail, or Leaſe for Life of Land by Deed or without Deed, reſerving a Rent, or of a Rent-Service by Deed; in theſe Caſes there is annexed an implied Warranty againſt the Donor or Leſſor, his Heirs and Aſſigns. 1 Inſt 334. The Aſſignee likewiſe of Leſſee for Life ſhall take the Benefit of this Warranty in Law.

8. So

1 Inſt. 384. 8. So when Dower is aſſigned to a Woman, there is a Warranty in Law included, which is that the Tenant in Dower being impleaded, ſhall vouch and recover in Value a third Part of the two Parts whereof ſhe is dowable.

Id. Ibid. 9. And this Warranty in Law is of the Nature of a lineal Warranty, and ſhall bind as a lineal Warranty only, for it never bars any collateral Title.

Id. Ibid. 10. And hence it is, that this Warranty and Aſſets in ſome Caſes is a good Bar; as if a Tenant in Tail exchanges for other Lands which are deſcended to the Iſſue, and he has accepted of them, or if not, that other Lands are deſcended to him.

Id. Ibid. 11. But if Tenant in Tail of Lands makes a Gift in Tail, or Leaſe for Life, rendering Rent, and dies; this is no Bar.

12. And yet if other Aſſets in Fee-Simple deſcend, this Warranty in Law and Aſſets is a good Bar.

(F) Of the Nature of lineal Warranty, and how far it ſhall bind.

Lit. ſec. 703. 1. A Warranty is called Lineal, when if no Deed with Warranty had been made by the Father, then the Right of the Tenements ſhould deſcend to the Heir, and the Heir ſhould convey the Deſcent from his Father, *&c.*

1 Inſt. 370. 2. And it is added by Lord *Coke*, that it is called a lineal Warranty, not becauſe it muſt deſcend upon the lineal Heir; for be the Heir Lineal or Collateral, if by Poſſibility he might claim the Land from him that made the Warranty, it is Lineal, having Regard to the Warranty and Title of the Land.

Lit. ſec. 703. 3. As where a Man ſeized of Lands in Fee, maketh a Feoffment by his Deed to another, and binds himſelf and his Heirs to Warranty, and hath Iſſue and dies, and the Warranty deſcends to his Iſſue, this is a lineal Warranty.

Lit. ſec. 706. 1 Inſt. 371. 4. So if there be a Grandfather, Father and Son, and the Grandfather be diſſeized, and the Father releaſes to the Diſſeizor being in Poſſeſſion with Warranty, *&c.* and dies, and after the Grandfather dies; this is a lineal Warranty to the Son; and although in this Caſe the Warranty deſcends before the Right, yet it is a good Bar.

Lit. ſec. 707. 5. Likewiſe if there be two Brothers, and the Father is diſſeized, and the eldeſt Brother releaſes with Warranty, and dies without Iſſue, and after the Father dies, and the Warranty deſcends to the younger Son; this is a lineal Warranty to him, for though the eldeſt Son died in the Life-time of the Father, yet he might poſſibly have conveyed the Title to his younger Brother, if no ſuch Warranty had been.

Termes de la Ley Tit. Garranty. 6. And in every Caſe where one demands an Eſtate-Tail, if any Anceſtor of the Iſſue in Tail, whether he had Poſſeſſion of the Land or not, has made a Warranty, and if the Iſſue, that was to bring a Writ in *Formedon*, may or might by Poſſibility, have conveyed to himſelf a Title by Force of the Gift by him that made the Warranty; this is a lineal Warranty, whereby the Iſſue in Tail ſhall not be barred, except he have Aſſets to him deſcended in Fee-Simple.

7. As if a Man be ſeized of Land of an Eſtate-Tail to him and his Heirs of his Body begotten, and makes a Feoffment of it, and binds him and his Heirs to warrant it, and has Iſſue, and dies; this Warranty deſcending upon the Iſſue is a lineal Warranty.

Lit. ſec. 719. 8. And if Lands be given to one and the Heirs Male of his Body, and for want of ſuch Iſſue to the Heirs Female of his Body, and the Donee makes

makes a Feoffment with Warranty, and has Iſſue a Son and a Daughter, and dies; this Warranty is lineal to the Son, and if the Son dies without Iſſue Male, it is a lineal Warranty from the Father to the Daughter.

9. But if the Brother in his Life-time releaſes to the Diſcontinuee, *&c.* with Warranty, *&c.* and after dies without Iſſue; this is a collateral Warranty to the Daughter. Id. Ibid. The Reaſon is becauſe ſhe cannot convey to her the Right which ſhe hath by Force of the Remainder by any Means of Deſcent by her Brother, for that the Brother is collateral to the Title of his Siſter, and therefore his Warranty is collateral. Id. Ibid.

10. If Lands be given to the Huſband and Wife and the Heirs of their two Bodies engendered, and they have Iſſue a Son, and the Huſband diſcontinues, and dies, and after the Wife releaſes with Warranty, and dies; this is a lineal Warranty to the Son. Lit. 714. The Son ſhall not be barred in this Caſe unleſs he hath Aſſets by Deſcent in Fee-Simple by the Mother, becauſe their Iſſue ought to convey their Right as Heirs to Father and Mother of their two Bodies begotten, *per Formam Doni*, and therefore the Warranty of the Father and the Warranty of the Mother are but lineal Warranties to the Heirs. Id. Ibid.

11. And if Lands be given to a Man and Woman unmarried, and the Heirs of their two Bodies, and they intermarry, and are diſſeized, and the Huſband releaſes with Warranty, and dies, and after the Wife dies; this is a lineal Warranty to the Iſſue for the Whole. 1 Inſt. 375. Becauſe the Iſſue muſt convey his Right as Heir to his Father and Mother of their two Bodies engendered, and therefore it is collateral for no Part. Id. Ibid.

12. And if a Father gives Land to his eldeſt Son and the Heirs Male of his Body, *&c.* the Remainder to the ſecond Son, *&c.* if the eldeſt Son aliens in Fee with Warranty, *&c.* and has Iſſue Female, and dies without Iſſue Male; this is a lineal Warranty to the ſecond. Lit. 718.

13. It is a Rule as to the lineal Warranties, that they bar the Right to a Fee-Simple without Aſſets, for he that demandeth Fee Simple by any of his Anceſtors, ſhall be barred by Warranty lineal which deſcendeth upon him, unleſs he be reſtrained by ſome Statute. Lit. c. 711.

14. But it doth not bar the Right of an Eſtate-Tail, unleſs the Heir hath Aſſets by Deſcent in Fee-Simple, by the ſame Anceſtor that made the Warranty. Lit. c. 712.

15. Yet if the Iſſue in Tail aliens the Aſſets deſcended, and dies, the Iſſue of that Iſſue is not barred by this Warranty and Aſſets: But if the Iſſue to whom the Warranty and Aſſets deſcended, had brought a Formedon, and by Judgment had been barred by reaſon of the Warranty and Aſſets: In that Caſe, though he aliens the Aſſets, yet the Eſtate-Tail is barred for ever. 1 Inſt. 393.

16. But for the more clear Underſtanding what Aſſets are requiſite to bar the Right of an Entail, it will be proper to conſider,

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(G) What ſhall be deemed ſufficient Aſſets to make a lineal Warranty a Bar.

1. THE Aſſets requiſite to make a lineal Warranty a Bar, muſt have ſix Qualities. Firſt, they muſt be Aſſets (that is) of equal Value, 1 Inſt. 374 b. A Seignory in Frankalmoigne is no Aſſets, becauſe it is not valuable, and therefore not to be extended; and ſo it ſeemeth of a Seignory of Homage and Fealty. But an Advowſon is Aſſets. Id. Ibid.

or

or more, at the Time of the Deſcent. Secondly, they muſt be of Deſcent, if not by Purchaſe or Gift. Thirdly, they muſt be Aſſets in Fee-Simple, and not in Tail, or for another Man's Life. Fourthly, they muſt deſcend to him as Heir to the ſame Anceſtor that made the Warranty. Fifthly, they muſt be of Lands or Tenements, or Rents or Services valuable, or other Profits iſſuing out of Lands or Tenements, and not perſonal Inheritances, or Annuities, and the like. Sixthly, It muſt be in State or Intereſt, and not in Uſe or Right of Actions, or Right of Entry; for they are no Aſſets until they be brought into Poſſeſſion. But if a Rent in Fee-Simple iſſuing out of Land of the Heir deſcend unto him, whereby it is extinct, yet this is Aſſets; and to this Purpoſe, hath in Judgment of Law a Continuance.

(H) Of the Nature of a collateral Warranty at Common Law, and how far it barred.

Terms *de la* Ley Tit. Garranty.

1. WHEREVER the Heir cannot by any Poſſibility convey to himſelf a Title by Force of his Gift that made the Warranty, then that is a collateral Warranty, and thereby the Right of the Heir ſhall be barred without any Aſſets.

Lit. ſec. 709. The Reaſon that the Warranty of the Uncle having no Right to the Land entailed, ſhall bar the Iſſue in Tail is, for that the Law preſumeth that the Uncle would not unnaturally diſinherit his lawful Heir, being of his own Blood, of that Right which the Uncle never had, but came to the Heir by another Mean, unleſs he left him greater Advancement. 1 Inſt. 373. a.

2. As if Tenant in Tail diſcontinue the Tail, and hath Iſſue and dieth, and the Uncle of the Iſſue releaſe to the Diſcontinuee with Warranty, *&c.* and dieth without Iſſue, this is a collateral Warranty to the Iſſue in Tail, becauſe the Warranty deſcendeth upon the Iſſue who cannot convey himſelf to the Entail by Means of his Uncle.

Lit. ſec. 707.

3. If there be Father and two Sons, and the Father is diſſeiſed, and the younger Son releaſes with Warranty to the Diſſeiſor, and dies without Iſſue, this is a collateral Warranty to the eldeſt Son, becauſe that of ſuch Land as was the Father's, the Elder can by no Poſſibility convey to him the Title by Means of the younger Son.

Lit. ſec. 704. The Reaſon is, for that if no ſuch Deed with Warranty had been made, the Son could in no Manner convey his Title from his Father to him, inaſmuch as the Father had no Eſtate in Right to the Land, but was collateral to the Title of the Land. Lit. ſec. 705.

4. Likewiſe if there be Father and Son, and the Son purchaſe Lands in Fee, and the Father of this diſſeiſeth the Son, and alieneth to another in Fee by Deed, and by the ſame Deed bind him and his Heirs to Warranty, *&c.* and the Father dieth, the Son is barred by this Warranty which is a collateral Warranty, though it deſcendeth lineally from the Father to the Son.

Lit. ſec. 708. But if the eldeſt Son die without Iſſue, the youngeſt Brother may recover, becauſe the Warranty of the middle One is lineal to the Youngeſt. Id. Ibid.

5. Alſo if Tenant in Tail hath Iſſue three Sons, and diſcontinue the Tail in Fee, and the middle Son releaſe by his Deed to the Diſcontinuee, and bind him and his Heirs to Warranty, and after the Tenant in Tail dieth, and the middle Son dieth without Iſſue, this is a collateral Warranty to the eldeſt Son, inaſmuch as he can by no Means convey to him by Force of the Tail, any Deſcent by the middle Brother.

6. Many

6. Many other Examples might be produced where theſe collateral Warranties at Common Law did bind the Right of Eſtates in Fee-Simple, and alſo of Eſtates in Fee-Tail. But the Law in this Reſpect has been greatly altered by the following Statutes: And firſt by the Statute of *Glouceſter*.

(I) Of the Alterations introduced by the Statute Law.

1. BEFORE the Statute of *Glouc'* all Warranties which deſcended to them which were Heirs to thoſe who made the Warranties, were Bars to the ſame Heirs to demand any Lands or Tenements againſt the Warranties, except the Warranties which commenced by Diſſeizin. For ſuch Warranty was no Bar to the Heir, for that the Warranty commenced by Wrong, *viz.* by Diſſeizin. Lit. ſec. 697.

2. By this Statute of *Glouceſter* four Things are enacted. 1 Inſt. 365.

3. 1ſt. That if a Tenant by the Curteſy alien with Warranty and dieth, that this ſhall be no Bar to the Heir in a Writ of *Mortdanceſtor* without Aſſets in Fee-Simple. And if Lands or Tenements deſcend to the Heir from the Father, he ſhall be barred, having regard to the Value thereof.

4. 2dly. That if the Heir, for want of Aſſets at that Time deſcended, doth recover the Lands of his Mother by Force of this Act, and afterwards Aſſets deſcend to the Heir from the Father, then the Tenant ſhall recover againſt the Heir the Inheritance of the Mother by a Writ of falſe Judgment, which ſhall iſſue out of the Record, to reſummon him that ought to warrant, as hath been done in other Caſes, where the Heir being vouched cometh into the Court, and pleadeth that he hath nothing by Deſcent. Id. Ibid.

5. 3dly. That the Iſſue of the Son ſhall recover by a Writ of *Coſinage*, *Aiel*, and *Beſaiel*. Id. Ibid.

6. And laſtly, That the Heir of the Wife after the Death of the Father and Mother, ſhall be barred of his Action to demand the Heritage of the Mother by Writ of Entry, which his Father aliened in the Time of his Mother, whereof no Fine was levied in the King's Court.

7. Likewiſe by the 11th *Hen.* 7. *c.* 20. Where a Wife after her Huſband's Death ſhall alone, or with her ſucceeding Huſband, alien, releaſe, confirm or diſcontinue with Warranty, the Land ſhe holdeth in Dower, or in Tail, of the Gift of her former Huſband, or any of his Anceſtors, ſuch Warranty, *&c.* is made void.

8. And laſtly, by the 4 & 5 *Ann. c.* 16. "All Warranties which ſhall be made after the firſt Day of *Trinity* Term 1705, by any Tenant for Life, of any Lands, Tenements or Hereditaments, the ſame deſcending or coming to any Perſon in Reverſion or Remainder, ſhall be void and of no Effect; and likewiſe all collateral Warranties which ſhall be made after the ſaid *Trinity* Term, of any Lands, Tenements or Hereditaments, by any Anceſtor who has no Eſtate of Inheritance in Poſſeſſion in the ſame, ſhall be void againſt his Heir.

(K) What

(K) What ſhall be deemed Warranties by Diſſeiſin, Abatement or Intruſion.

1. WARRANTIES are ſaid to commence by Diſſeiſin in the following Caſes, as—

Lit. ſec. 698. 2. Where there is Father and Son, and the Son purchaſeth Land, &c. and letteth it to the Father, or any other Anceſtor, for Term of Years, or at Will, and the Father, &c. thereof by Deed enfeoffeth another in Fee, and binds him and his Heirs to Warranty, and the Father dieth, whereby the Warranty deſcendeth upon the Son, this Warranty commences by Diſſeiſin.

Lit. ſec. 698. 699. 1 Inſt. 367. 3. In the ſame Manner, if Tenant by *Elegit*, Tenant by Statute Merchant, Statute Staple, Guardian in Chivalry, or Socage, or becauſe of Nature, make a Feoffment in Fee with Warranty; this ſhall not bind the Heir, becauſe ſuch Warranties commence by Diſſeiſin.

Lit. ſec. 700. 4. Alſo if Father and Son purchaſe Lands to have and to hold to them jointly, &c. and after the Father alien the whole to another, and bind him and his Heirs to Warranty, &c. and after the Father dieth, this Warranty, as to the Moiety which belongs to the Son, commences by Diſſeiſin.

1 Inſt. 367. b. 5. But if the Purchaſe were to the Father and the Son, and the Heirs of the Son, and the Father makes a Feoffment to Fee with Warranty, if the Son entereth in the Life of the Father, and the Feoffee re-enter, and the Father dieth, the Son ſhall have an Aſſize of the whole. If the Son however had not entered in the Life of the Father, then, for the Father's Moiety, it had been a Bar to the Son, for that therein he had an Eſtate for Life, and therefore the Warranty, as to that Moiety, had been collateral to the Son; and as to the Son's Moiety, it would be a Warranty by Diſſeiſin, and ſo the Warranty would be defeated in Part and ſtand good in Part.

Id. Ibid. 6. If, on the other Hand, the Purchaſe had been to the Father and Son, and the Heirs of the Father, then the Entry of the Son in the Life of the Father, in Avoidance of the Warranty, had not availed him, becauſe his Father lawfully conveyed away his Moiety.

1 Inſt. 366. b. 7. If the Father be Tenant for Life, Remainder to the Son in Fee, and the Father by Covin and Conſent maketh a Leaſe for Years, to the End that the Leſſee ſhall make a Feoffment in Fee to whom the Father ſhall releaſe with Warranty, and all this is executed accordingly, and the Father dieth, this Warranty begins by Diſſeiſin.

Id. Ibid. 8. So if one Brother makes a Gift in Tail to another, and the Uncle diſſeiſes the Donee, and enfeoffeth another with Warranty, and the Uncle dieth, and the Warranty deſcendeth upon the Donor, and then the Donee dieth without Iſſue, this Warranty alſo begins by Diſſeiſin.

1 Inſt. 367. a. And the third Perſon ſhall not only avoid the Feoffment for his own Part, but for the Part of the Son. 9. If the Father, the Son, and a third Perſon are Jointenants in Fee, and the Father makes a Feoffment in Fee of the whole with Warranty and dieth, and the Son dieth, the Warranty as to the Part of the Son, and the Part of the third Perſon, begins by Diſſeiſin.

1 Inſt. 369. b. 10. Alſo if a Man who hath no Right, enters into Lands and makes a Feoffment of them with Warranty, this commences by Diſſeiſin.

1 Inſt. 366, 367. 11. Lord *Coke* enumerates ſeveral Qualities belonging to Warranties commencing by Diſſeiſin.

12. Firſt, That the Diſſeiſin is generally done immediately to the Heir who is bound by the Warranty.

13. Secondly, That the Warranty and Diſſeiſin are *Simul* and *Semel*.

14. And

14. And yet if a Man commit a Diſſeiſin with Intent to make a Feoffment in Fee with Warranty, although he make the Feoffment many Years after the Diſſeiſin, yet being done with that Intent, it ſhall be a Warranty commencing by Diſſeiſin. 5 Rep. 80. Fitzherbert's Caſe.

15. The Law is the ſame with reſpect to Warranties commencing by Abatement or Intruſion, if the Abatement or Intruſion be made with Intent to make a Feoffment in Fee with Warranty, for theſe alſo commence by Wrong. 1 Inſt. 367. a.

16. So if a Tenant dieth without Heir, and an Anceſtor of the Lord enter before the Entry of the Lord, and make a Feoffment in Fee with Warranty, and dieth, this Warranty ſhall not bind the Lord, becauſe it commenceth by Wrong, being in the Nature of an Abatement. Id. Ibid.

(L) Of the Effects of a Warranty in Deed.

1. THE Effect of a Warranty in Deed has been partly explained in conſidering the Nature of the ſeveral Kinds of Warranty. It may be neceſſary however to obſerve that a Warranty in Deed always bars the Warrantor himſelf of the Land ſo warranted for ever; ſo that all the preſent and future Rights which he hath or may have therein are thereby extinct. Therefore,

2. If the Father be diſſeiſed, and the Son in his Life-time releaſe all his Right in the Land to the Diſſeiſor, and make a Warranty of the Land in the Deed, and then the Father dies, and Right of the Land deſcends to the Son; in this Caſe, although the Releaſe does not bar the Son, yet the Warranty bars him. 1 Inſt. 265. a. & b.

3. For the moſt Part likewiſe, it bars the Heirs of him who made the Warranty, to whom the ſaid Warranty deſcends, to demand the Land againſt the ſaid Warranty; for if the Warranty be lineal, it is, as has been ſhewn, a Bar of an Eſtate in Fee-Simple without any Aſſets, that is, without any other Land deſcended to him in Fee-Simple from the ſame Anceſtor that made the Warranty: And with Aſſets it is a Bar of an Eſtate in Tail. 1 Inſt. 374. b. 384.

4. If the Warranty be collateral, it is, with or without Aſſets, a Bar of an Eſtate in Fee-Simple or Fee-Tail, and all Poſſibility of Right thereunto. But a collateral Warranty doth not give a Right, but only bindeth the Right, ſo long as the Warranty continueth; for if it be determined, removed or defeated, the Right is revived. 1 Inſt. 372. 374. b.

5. But neither the lineal or collateral Warranty can enlarge an Eſtate; and therefore if the Leſſor by Deed releaſes to his Leſſee for Life, and warrants the Land to him and his Heir; this does not make his Eſtate greater, neither will it bar Titles of Entry or Action in Caſes of Mortmain, Conſent to a Raviſher, Mortgage or Dower: And therefore if an Anceſtor of the Lord has Title to enter upon an Alienation in Mortmain, and he releaſes and makes a Feoffment with Warranty, this Warranty will neither bar him or his Heir. 10 Rep. 97. Edward Seymor's Caſe. 1 Inſt. 385. b. 389. a.

6. As to the Warranty which commences by Diſſeiſin, it does not, as has been ſhewn, bar any Eſtate with or without Aſſets.

7. No Fine or Warranty ſhall bar any Eſtate in Poſſeſſion, Reverſion or Remainder, which is not deveſted and put to a Right; for he who has the Eſtate or Intereſt in him, cannot be put to his Action, Entry or Claim; for he has that already which Entry, Action, or Claim, can give him. 1 Inſt. 388. b.

(M) What

(M) What Uſe may be made of a Warranty in Deed.

Termes de la Ley Tit. Garranty.

1. WHERE a lineal or collateral Warranty is a Bar, there if the Party be impleaded by him who made the Warranty, or his Heirs, the Party impleaded, who is Tenant of the Land, may plead and ſhew forth his Warranty againſt him, and demand Judgment whether contrary to his own Warranty, he ſhall be received to demand the Thing warranted; and this in Pleading is called a *Rebutter*.

1 Inſt. 101, 393.

2. But if the Party be impleaded or ſued by *another* for the Land in an Action wherein he may vouch, then he to whom the Warranty is made or his Heirs may vouch, that is, call in the Warrantor or his Heirs to warrant the Land: And this is an Interpleader in the Nature of an Action brought by the Warrantor, againſt the Warrantee, wherein he that vouches, who is called the Voucher, is Demandant, and he that is vouched, who is called the Vouchee, is made Tenant or Defendant to the Action, and the Voucher is as it were out of the Suit: And this ſecond Tenant, the Vouchee is called the Tenant by the Warranty: And hereupon a Writ iſſues to the Sheriff to ſummon the Vouchee to appear, which Writ is called a *Summoneas ad Warrantizandum*.

Id. Ibid.

3. If the Vouchee appears, he muſt plead to the Voucher: And if he ſhews Cauſe why he ſhould not warrant, that muſt be tried; and this ſhewing of Cauſe is called a Counterplea to the Voucher.

Id. Ibid.

4. But if he pleads in Avoidance of the Warranty, it is called a Counterplea to the Warranty: And if he cannot defend himſelf againſt the Warranty, the Stranger ſhall recover the Land demanded againſt the Voucher, and he ſhall recover as much other Land againſt the Vouchee of the Lands he has or had at the Time of the Voucher: And this Recovery of other Lands is called a Recovery in Value.

Id. Ibid.

5. If the Vouchee at the Time of the Voucher and Recovery has no Lands deſcended to him to anſwer the Warrantee, but has afterwards Lands falling to him by Deſcent from that Anceſtor, then the Voucher may have a Reſummons, and recover the Land which afterwards falls.

Id. Ibid.

6. But if the Sheriff returns upon the Summons that the Vouchee is ſummoned, and he nevertheleſs maketh Default, then he ſhall have a *Magnum Cape ad Valentiam*, when if he makes Default again, the Judgment ſhall be given againſt the Voucher, and he ſhall recover over the Value againſt the Vouchee: And if the Vouchee appears and then makes Default, the Voucher ſhall have a *Parvum Cape ad Valentiam*, and then if he makes Default, Judgment ſhall be given as before.

7. But if the Sheriff upon the Summons returns that *he has nothing whereby he may be ſummoned*, then, after Writs of *Alias* and *Pluries*, a Writ called *Sequatur ſub ſuo Periculo*,* ſhall be awarded; and if the like Return be made, the Demandant ſhall have Judgment againſt the firſt Tenant, but he cannot recover in Value againſt the Vouchee, becauſe he was never warned, and it appeareth that he hath nothing.

* It is called *Sequatur ſub ſuo Periculo*, becauſe the Tenant ſhall loſe his Land without any Recompence in Value, unleſs he upon that Writ can bring in the Vouchee to warrant the Land unto him: And if at the *Sequatur ſub ſuo Periculo*, the Tenant and the Vouchee make Default, and the Demandant hath Judgment againſt the Tenant, and after brings a *Scire Facias* to have Execution, the Tenant may have a *Warrantia Chartæ*, and if he were impleaded by a Stranger, he may vouch again. But if he had Judgment to recover in Value, he ſhall never have a *Warrantia Chartæ*, nor vouch again, for by this Judgment to recover in Value, he hath had the Benefit of the Warranty.

8. If the Vouchee had a Warranty from ſome other for the Land, he may *deraign*, that is, maintain the Warranty over, and ſhall recover in Value alſo againſt his Vouchee in the ſame Manner as before.

9. But

9. But if the Warrantee to whom the Warranty is made, or his Heirs, be impleaded in an Aſſiſe, or in a Writ of Entry in the Nature of an Aſſiſe, in which Actions they cannot vouch, then they ſhall have a Writ *de Warrantia Chartæ* againſt the Warrantor who made the Warranty, or his Heirs. F.N.B.134. If he be impleaded in any Action in which he may vouch, then he ought to vouch to Warranty; and if he will not, he ſhall not afterwards have a Writ of *Warrantia Chartæ*.

10. Likewiſe the Warrantee or his Heirs, may at any Time before they be impleaded for the Land, bring a *Warrantia Chartæ* upon the Warranty in the Deed againſt the Warrantor or his Heirs, and thereby all the Land the Heir of the Warrantor has by Deſcent from the Anceſtor, who made the Warranty, at the Time of the Writ brought, ſhall be bound and charged with the Warranty into whoſe Hands ſoever it goes afterwards; ſo if the Land warranted be after recovered from the Warrantee, he ſhall have ſo much Land over again of the other Land of the Heir of the Warrantor, or of the Warrantor himſelf, if he be living: And although the Warrantee or his Heirs, recover in this Writ, yet upon Occaſion he may afterwards vouch the Warrantor or his Heirs notwithſtanding. Id. Ibid.

11. It is to be obſerved moreover, that it is good Policy, if a Man ſuſpect any Thing, to bring this Writ of *Warrantia Chartæ* betimes, becauſe it binds all the Lands of the Warrantor from the Time of the Writ brought, and not any of his other Land he had before that Time, which are now aliened. Id. Ibid. But if a Man be vouched, he ſhall not render in Value, but of the Lands he had at the Time of the Voucher.

12. But if a Man recover his Warranty by Writ of *Warrantia Chartæ*, and hath bounden the Land which the Vouchee had at that Time; yet if he be afterwards impleaded for that Land, for which he recovered his Warranty, he ought to vouch him againſt whom he recovered his Warranty, to defend the Land, if he be ſued in any Action wherein he may vouch; otherwiſe he ſhall not have Advantage by Recovery of his Warranty in the *Warrantia Chartæ*. Id. Ibid.

13. And if a Man recover his Warranty in a *Warrantia Chartæ*, and afterwards is impleaded in an Action in which he cannot vouch, as by Aſſiſe or by a *Scire Facias* ſued forth upon a Fine, *&c.* It ſeemeth he ought to give Notice to him againſt whom he hath recovered his Warranty of the Action, and to pray him to ſhew him what he ſhall plead to defend the Land. Id. Ibid.

(N) Who may take Advantage of a Warranty, and againſt whom.

1. ALL ſuch as are Parties to the Warranty, that is, ſuch as are named in the Deed, ſhall take Advantage of the Warranty; as if one warrant Lands to another, his Heirs and Aſſigns; in this Caſe both the Heirs and Aſſigns may take Advantage of it, and they may both vouch or rebut, or have a *Warrantia Chartæ*, ſo as they come in in Privity of Eſtate; for otherwiſe the Heirs or Aſſigns cannot vouch, or have a *Warrantia Chartæ*, but yet they may in many Caſes * rebut. 1 Inſt. 384. b. 385. a. 5 Rep. 71. Spencer's Caſe.

* As in Diſſeiſin, Abatement, Intruſion, Uſurpation or otherwiſe, they ſhall rebut, by Force of the Warranty, as a Thing annexed to the Land.

2. But

Id. Ibid. 2. But herein a Difference is to be obſerved, when in the Caſes aforeſaid, he that rebutteth claimeth under the Warranty, and when he that would rebut claimeth above the Warranty, for there he ſhall not rebut.

3. Therefore if Lands be given to two Brethren in Fee-Simple, with a Warranty to the Eldeſt and his Heirs, and the Eldeſt dieth without Iſſue, the Survivor, though he be Heir to him, ſhall neither vouch nor rebut, nor have a *Warrantia Chartæ*, becauſe his Title to the Land is by Relation above the Fall of the Warranty, and he cometh not under the Eſtate of him to whom Warranty is made, as the Diſſeiſor, *&c.* doth.

Id. Ibid. 4. If a Man doth warrant Lands to two Men and their Heirs, and the one maketh a Feoffment in Fee, yet the other ſhall vouch for his Moiety.

Id. Ibid. 5. If a Man be enfeoffed with Warranty to him, his Heirs and Aſſigns, and he make a Gift in Tail, the Remainder in Fee, and the Donee makes a Feoffment in Fee, that Feoffee ſhall not vouch as Aſſignee, becauſe no Man ſhall vouch as Aſſignee, but he that cometh in in Privity of Eſtate, but he muſt vouch his Feoffor, and he vouch as Aſſignee; but ſuch an Aſſignee may rebut.

6. So if the Warranty be made to a Man and his Heirs, without this Word (*Aſſigns*) yet the Aſſignee, or any Tenant of the Land may rebut.

1 Inſt. 384. b. 7. If a Man enfeoff *A.* and *B.* to have and to hold to them and their Heirs with a Clauſe of Warranty *Predictis* A. & B. *& eorum Hæredibus & Aſſignatis:* In this Caſe if *A.* dieth, and *B.* ſurviveth and dieth, and the Heir of *B.* enfeoffeth *C.* he ſhall vouch as Aſſignee; and yet he is but the Aſſignee of the Heir of one of them; for in Judgment of Law, the Aſſignee of the Heir is the Aſſignee of the Anceſtor; and ſo the Aſſignee of the Aſſignee ſhall vouch *in infinitum*, within theſe Words (his Aſſigns).

Id. Ibid. 8. If a Man enfeoffeth *A.* to have and to hold to him, his Heirs and Aſſigns, and *A.* enfeoffeth *B.* and his Heirs, and *B.* dieth, the Heir of *B.* ſhall vouch as Aſſignee of *A.* So that Heirs of Aſſignees, and Aſſignees of Aſſignees, and Aſſignees of Heirs, are within this Word (Aſſigns).

Id. Ibid. 9. But thoſe who are not named for the moſt part ſhall not take Advantage of the Warranty; and therefore if Land be warranted to *J. S.* without the Word (Heirs) his Heirs ſhall not vouch, and regularly, if he warrant Land to a Man and his Heirs, without naming Aſſigns, his Aſſignee ſhall not vouch. Yet if the Father be enfeoffed with Warranty to him and to his Heirs, and the Father enfeoffeth his eldeſt Son with Warranty, and dieth, the Law giveth the Son Advantage of the Warranty made to his Father, becauſe by Act of Law the Warranty between the Father and the Son is extinct.

1 Inſt. 384. a. & b. 10. The Warranty wrought by the Word *Dedi*, and the Warranty annexed to an Exchange, Partition, *&c.* does not extend to Aſſignees. But yet in Caſes of Exchange, and of Warranties by the Word *Dedi*, the Aſſignee ſhall rebut.

1 Inſt. 385. b. 11. If a Man make a Feoffment in Fee with Warranty to him, his Heirs and Aſſigns, by Deed, and the Feoffee enfeoffeth another by Parol, the ſecond Feoffee ſhall vouch, or have a *Warrantia Chartæ*, as Aſſignee, although he hath no Deed of the Aſſignment, becauſe the Deed comprehending the Warranty, doth extend to the Aſſignees of the Land, and he is a ſufficient Aſſignee, although he hath no Deed.

Id. Ibid. 12. If a Man make a Feoffment in Fee to *A.* his Heirs and Aſſigns, and *A.* enfeoffeth *B.* in Fee, who re-enfeoffeth *A.* He or his Aſſigns ſhall never vouch, for *A.* cannot be his own Aſſignee. But if *B.* had enfeoffed the Heir of *A.* he may vouch as Aſſignee; for the Heir of *A.* may be Aſſignee to *A* inaſmuch as he claimeth not as Heir.

Id. Ibid. 13. If one makes a Feoffment to two, their Heirs and Aſſigns, and one of them makes a Feoffment in Fee, this Feoffee in this Caſe ſhall not take Advantage as Aſſignee.

13. But

14. But an Aſſignee of Part of the Land ſhall take Advantage of a Warranty; as, 1 Inſt. 385. a.

15. If a Man makes a Feoffment of two Acres with Warranty to him, his Heirs and Aſſigns, and the Feoffee makes a Feoffment of one Acre of it to another, in this Caſe the ſecond Feoffee ſhall take Advantage of the Warranty as Aſſignee.

16. Therefore there is a Difference between the whole Eſtate in Part, and Part of the Eſtate in the whole, or in any Part; for if a Man has a Warranty to him, his Heirs and Aſſigns, and he makes a Leaſe for Life or Gift in Tail; in theſe Caſes the Leſſee or Donee ſhall not take Advantage of the Warranty as Aſſignee, becauſe they have not the Eſtate in Fee-Simple, whereunto the Warranty was annexed, but they may vouch the Leſſor or Donor, and by this Means take Advantage of the Warranty. Id. Ibid.

17. But if a Leaſe for Life be made, the Remainder in Fee, ſuch a Leſſee may vouch as Aſſignee, becauſe the whole Eſtate is out of the Leſſor, and the particular Eſtate and the Remainder do in Judgment of Law, to this Purpoſe, make but one Eſtate. Id. Ibid.

18. If a Man enfeoffs a Woman with Warranty, and they intermarry and are impleaded, and upon Default of the Huſband, the Wife is received, in this Caſe ſhe may vouch her Huſband, *& ſic e converſo*, if a Woman enfeoffs a Man with Warranty, and they intermarry and are impleaded, the Huſband in this Caſe ſhall vouch himſelf and the Wife. 1 Inſt. 390.

19. He who comes into Land merely by Act of Law in *the Poſt*, as the Lord by Eſcheat or the like, ſhall never take Advantage of a Warranty; and therefore if Tenant in Dower enfeoffs a Villein with Warranty, and the Lord of the Villein enters; or a Feoffment be to a Baſtard with Warranty, and he dies without Iſſue, and the Lord enters by Eſcheat, the Lord ſhall never take Advantage of theſe Warranties. 3 Rep. 62 & 63. Lincoln College Caſe.

20. But it is otherwiſe where a Man comes to the Land by Limitation of Uſe, or by common Recovery, which is the Act of the Party; for if Tenant in Tail being in of another Eſtate, that is, by Diſſeiſin, or Feoffment of a Diſſeiſor, ſuffers a common Recovery, and a collateral Anceſtor of the Tenant in Tail releaſes with Warranty to the Recoveror, and after the Recoveror makes a Feoffment to Uſes, which are executed by the Statute of 27 *H.* 8. and after the collateral Anceſtor dies; in this Caſe the Terre-tenants may take Advantage of the Warranty by Way of Rebutter, although the Eſtate be transferred in the *Poſt*. Id. Ibid.

21. So if he to whom the Warranty is made ſuffers a common Recovery, and after the Anceſtor dies; the Recoveror may take Advantage of the Warranty by Way of Rebutter; for any Man that has the Poſſeſſion of Land, although he has no Deed to ſhew how he got Poſſeſſion of it, or how he is Aſſignee, may rebut the Demandant, and ſo bar him, and defend his own Poſſeſſion. Id. Ibid.

22. Therefore Tenant by the Curteſy, Donee in Tail who is in of another Eſtate, an Aſſignee by Force of a Warranty made to a Man and his Heirs, Feoffee of a Donee in Tail may rebut and bar the Demandant by the Warranty. Id. Ibid.

23. If one enfeoffs another of an Acre of Ground with Warranty, and has Iſſue two Sons, and dies ſeized of another Acre of Land of the Nature of *Borough Engliſh*; in this Caſe, although the Warranty deſcends upon the eldeſt Son only, yet both the Sons may be vouched; One as Heir to the Warranty, the other as Heir to the Land. 1 Inſt. 376. If he ſhould vouch the eldeſt Son only, he could not have the Fruit of his Warranty, that is, a Recovery in Value, and he cannot vouch the youngeſt Son only, becauſe he is not Heir at Common Law, upon whom the Warranty deſcends.

24. So it is alſo of Heirs in Gavelkind, the Eldeſt ſhall be vouched as Heir to the Warranty, and the Reſt in Reſpect to the Inheritance. Id. Ibid.

Id. Ibid. 25. In like Manner, the Heir at the Common Law, the Heir of the Part of the Mother ſhall be vouched, or the Heir at Common Law may be vouched alone at the Election of the Tenant.

Id. Ibid. 26. The Heir likewiſe at Common Law ſhall be vouched with the Heir in *Borough Engliſh*.

27. The Baſtard alſo ſhall be vouched with a Mulier.

Ibid. 28. If a Man dies ſeiſed of certain Lands in Fee, having Iſſue a Son and a Daughter by one Venter, and a Son by another, and the eldeſt Son enters, and dies, and the Land deſcends to the Siſter; in this Caſe, the Warranty deſcends on the Son, and he may be vouched as Heir, and the Siſter alſo may be vouched as Heir to the Land.

1 Inſt. 386. b. But if they are jointly bound in an Obligation, the Survivor only ſhall be charged. 29. If two make a Feoffment with Warranty, and one of them dies, the Survivor ſhall not be charged alone with the Warranty, but the Heir of him that is dead ſhall be charged alſo.

3 Rep. 14. Sir Wm. Herbert's Caſe. 30. Likewiſe if two are bound to warrant Land and both of them die, the Heirs of both of them ought to be vouched, and ſhall be equally charged.

Id. Ibid. 31. If the Heir be vouched in the Award of three ſeveral Perſons, the one of them only ſhall not be charged, but they ſhall be charged equally.

1 Inſt. 365. b. 32. If a Woman an Heireſs of the Diſſeiſor enfeoffs me with Warranty, and after ſhe is married to the Diſſeiſee; in this Caſe I may take Advantage of this Warranty againſt the Diſſeiſee, and rebut him upon it, if he ſues me for the Land.

Id. Ibid. 33. So if the Huſband and Wife ſue me for the Land of the Wife, and I have a Warranty of a collateral Anceſtor of the Huſband's, which deſcended to the Huſband; I may make uſe of this to bar the Huſband and Wife.

(O) When a Warranty ſhall be ſaid to be defeated, determined, ſuſpended or avoided.

Lit. ſec. 741. 1 Inſt. 393. a. & b. 1. WHEN a Warranty is made to a Man upon an Eſtate which he then had, if the Eſtate be defeated the Warranty is defeated: And a Warranty lineal or collateral may be defeated, determined or avoided in all or in Part, and this is ſometimes by Matter in Law and ſometimes by Matter in Deed.

Id. Ibid. 2. If an Eſtate Tail, to which a Warranty is annexed, be ſpent, the Warranty is determined: Or if a Man makes a Gift in Tail with Warranty, and the Donee afterwards makes a Feoffment, and dies without Iſſue, the Warranty is gone.

Id. Ibid. 3. So if Tenant in Tail diſcontinues the Tail, and the Diſcontinuee be diſſeiſed, or makes a Feoffment on Condition, and a collateral Anceſtor of the Iſſue releaſes to the Diſſeiſor or Feoffor on Condition, with Warranty, and after the Diſcontinuee enters upon the Diſſeiſor, or on the Feoffee, for the Condition broken, in this Caſe the Warranty made by the collateral Anceſtor is gone.

4. Likewiſe

4. Likewiſe if a Seignory be granted with Warranty, and the Tenancy eſcheat, ſo that the Seignory is extinct, conſequently the Warranty, which was annexed to it, is defeated. 1 Inſt. 392. b.

5. If the Father makes a Feoffment to his eldeſt Son, and dieth, and the Warranty deſcends upon the Son, the Warranty is extinct. 1 Inſt 384. b. But if the Father had been enfeoffed with Warranty to him and his Heirs, the Son, as has been ſhewn, might take Advantage of the Warranty made to his Father.

6. If Tenant in Tail makes a Feoffment to his Uncle, and the Uncle afterwards makes a Feoffment in Fee with Warranty to another, and after the Feoffee of the Uncle doth re-enfeoff the Uncle again in Fee, and after the Uncle enfeoffeth a Stranger in Fee without Warranty, and dieth without Iſſue, and the Tenant in Tail dieth, the Warranty made to the firſt Feoffee is hereby defeated. Lit. ſec. 743. Becauſe the Uncle took back to him as great an Eſtate from his firſt Feoffee to whom the Warranty was made, as the ſame Feoffee had from him; and if the Warranty ſhould ſtand, then the Uncle would warrant to himſelf, which cannot be.

7. So if the Uncle makes the Warranty to the Feoffee, his Heirs and Aſſigns, and takes back an Eſtate in Fee, and after enfeoffs another, yet the Warranty is defeated, becauſe he cannot be Aſſignee to himſelf. 1 Inſt. 390.

8. But if one makes a Feoffment with Warranty to the Feoffee, his Heirs and Aſſigns, and the Feoffee reinfeoffs the Feoffor and his Wife, or the Feoffor and a Stranger; in theſe Caſes the Warranty is not defeated, but continues ſtill. Id. Ibid.

9. So if two make a Feoffment with Warranty to one, his Heirs and Aſſigns, and the Feoffee reinfeoffs one of the Feoffors; in this Caſe the Warranty is not gone. Id. Ibid.

10. And if in the firſt Caſe before put by *Littleton, ſec.* 743. the Feoffee makes an Eſtate to his Uncle in Tail or for Life, ſaving the Reverſion, or a Releaſe for Life, the Remainder over, *&c.* in this Caſe the Warranty is only ſuſpended. Lit. ſec. 744. 1 Inſt. 390. But it is otherwiſe where the Uncle hath as great Eſtate in the Land of the Feoffee to whom the Warranty was made, as the Feoffee hath himſelf.

11. Alſo if the Uncle after ſuch Feoffment with Warranty, or Releaſe with Warranty, be attainted or outlawed of Felony; hereby the Warranty is gone; and although he afterwards obtains his Pardon, yet the Warranty is not revived. Lit. ſec. 745. 1 Inſt. 391.

12. Alſo if Tenant in Tail be diſſeiſed, and after make a Releaſe to the Diſſeiſor with Warranty in Fee, and after the Tenant in Tail is attaint or outlawed of Felony, and hath Iſſue and dieth, in this Caſe the Iſſue in Tail may enter upon the Diſſeiſor; for nothing makes a Diſcontinuance in this Caſe but the Warranty, and the Warranty cannot deſcend to the Iſſue in Tail, becauſe the Blood is corrupt between him that made the Warranty and the Iſſue: And if Tenant in Tail ſhould obtain his Pardon, the Warranty, as has been ſaid, would not revive. Lit. ſec. 746, 747. 1 Inſt. 391.

13. But if Tenant in Tail at the Time of his Attainder had no Iſſue, and after the obtaining of his Pardon had Iſſue, that Iſſue would be bound by the Warranty. 1 Inſt. 392. a.

14. If a Partition be made by Judgment upon a Writ of *Partitione faciendo*, by Force of the Statute of 31 *H.* 8. this does not defeat the Warranty, becauſe by Writ they are compellable by the Statute to make Partition. 6 Rep. 12. Morrice's Caſe.

15. But if a Feoffment with Warranty be made to two or more, and they being Jointenants afterwards, by Deed make Partition; by this the Warranty is determined; for though they were compellable by Writ to make Id. Ibid.

Partition, yet ſince they have not purſued the Statute by making Partition by Writ, the Warranty is gone.

Id. Ibid. 16. So if there be two Jointenants, and one of them diſſeizes the other, and he that is diſſeized recovers in an Aſſize, and has Judgment to hold in Severalty; hereby the Warranty is determined.

1 Inſt. 392. b. 17. As Warranties may be defeated and extinguiſhed by Matter in Law, ſo likewiſe they may be diſcharged or defeated by Matter in Deed: And this in three ſeveral Ways. For—

Lit. ſec. 748. 18. If the Party that has the Warranty, or the Eſtate to which the Warranty is annexed, releaſes to him that is bound to warrant all Warranties, or all Covenants real, or all Demands; by either of theſe Releaſes the Warranty is gone.

1 Inſt. 385. 19. If one enfeoffs three with Warranty to them and their Heirs, and one of them releaſes to one of the other two; hereby the Warranty is gone for that Part. But if one of them releaſes to the other two; in this Caſe the Warranty is not gone but continues, and they may vouch upon it.

1 Inſt. 390. 20. If Tenant in Tail enfeoffs his Uncle, who enfeoffs another in Fee with Warranty, and the Feoffee releaſes the Warranty to his Uncle; thereby the Warranty is extinct.

Id. Ibid. 21. But if a Gift in Tail be made with Warranty, in this Caſe a Releaſe made by the Tenant in Tail of the Warranty will not extinguiſh it.

1 Inſt. 393. 22. If two make a Feoffment in Fee, and warrant his Land to the Feoffee and his Heirs, and the Feoffee releaſes the Warranty to one of the Feoffors; this does not determine the Warranty of the other as to the Moiety.

Id. Ibid. 23. So if one enfeoffs two with Warranty, and one of them releaſes the Warranty; this does not extinguiſh the Warranty for the other Moiety, but it continues ſtill.

1 Inſt. 385. 24. If one doth warrant Land to two Men and their Heirs, and one of them makes a Feoffment in Fee; hereby the Warranty is not determined, but the other may vouch for his Moiety.

25. As Warranties may be defeated in the whole, ſo they may be defeated as to Part of the Benefit that may be taken of the ſame; as,

1 Inſt. 393. a. 26. He who has a Warranty may make a Defeaſance not to take any Benefit by Way of Voucher: In the like Manner that he ſhall take no Advantage by way of *Warrantia Chartæ*, or by way of Rebutter.

1 Inſt. 390. 27. If the Parties, between whom the Warranty is, intermarry, hereby the Warranty is ſuſpended during the Coverture in ſome Caſes.

Id. Ibid. 28. If Tenant in Tail makes a Feoffment in Fee with Warranty, and diſſeizes the Diſcontinuee, and dies ſeized; this ſuſpends the Warranty.

29. In ſome ſpecial Caſes there ſhall be no Recoveries in Value upon one Warranty; as,

1 Inſt. 393. a. 30. If a Diſſeiſor gives Lands to the Huſband and Wife, and to the Heirs of the Huſband, the Huſband aliens in Fee with Warranty, and dies, the Wife brings a *Cui in Vita*. The Tenant vouches and recovers in Value, if after the Death of the Wife the Diſſeiſee brings a *Præcipe* againſt the Alienee, he ſhall vouch and recover in Value again.

Id. Ibid. 31. So it is where the Wife brings a Writ of Dower againſt the Alienee, he ſhall recover in Value again upon the ſame Warranty.

Id. Ibid. 32. And it is in the ſame Manner if a Man be ſeized of a Rent by a Defeaſible Title, and releaſes to the Tenant of the Land all his Right in the Land, and warrants the Land to him and his Heirs; if he be impleaded for the Rent, he ſhall vouch and recover in Value for the Rent;

Rent; and if he be impleaded for the Land, he ſhall vouch and recover in Value again for the Land.

33. But in theſe and the like Caſes, the Reaſon is in Reſpect of the ſeveral Eſtates recovered, but for one and the ſame Eſtate he ſhall never recover but once in Value; and though the Land recovered in Value be evicted, yet he ſhall never take Benefit of the Warranty after. Id. Ibid.

34. A Warranty alſo may loſe its Force by taking Benefit or making Uſe thereof; for after a Man has once taken Advantage thereof in ſome Caſes, he can make no further Uſe of it. Id. Ibid.

35. If in a *Præcipe* the Tenant vouches, and at the *Sequatur ſub ſuo Periculo*, the Tenant and the Vouchee make Default, whereupon the Demandant has Judgment againſt the Tenant; and afterwards the Demandant brings a *Scire Facias* againſt the Tenant to have Execution; in this Caſe the Tenant may have a *Warrantia Chartæ*. Id. Ibid.

36. And if in that Caſe a Stranger had brought a *Præcipe* againſt the Tenant, the Warranty loſt not its Force; but if the Tenant had Judgment to recover in Value againſt the Vouchee; he ſhould not vouch again by reaſon of that Warranty, becauſe he had taken Advantage of the Warranty. Id. Ibid.

(P) How Warranties ſhall be expounded.

1. IT is a Principle of Law that all Warranties in general are to be favourably conſtrued, becauſe they are part of Mens Aſſurances.

2. It is to be obſerved likewiſe, that in ſome Caſes Warranties in Law are not taken away by expreſs Warranties; as if a Man leaſeth for Life, and farther bindeth himſelf and his Heirs to Warranty, here the expreſs Warranty doth not take away the Warranty in Law, for if he in Reverſion granteth over his Reverſion, and the Leſſee attorneth, and afterwards is impleaded, he may vouch the Grantee by the Warranty in Law, or he may vouch the Leſſor by the expreſs Warranty. 4 Rep. 81. Noke's Caſe.

3. So likewiſe if a Man makes a Feoffment in Fee by the Word *Dedi*, with an expreſs Warranty in the Deed, he may uſe the one or the other at his Election: And the Warranty wrought by this Word *Dedi* is a Special Warranty, and extendeth to the Heirs of the Feoffee during the Life of the Donor only. But upon an Exchange, the Warranty extendeth reciprocally to the Heirs, and againſt the Heirs of both Parties; though the Aſſignee ſhall not vouch by Force of ſuch Warranties. Id. Ibid. 1 Inſt. 384. a.

4. A Partition implies a Warranty in Law. Id. Ibid.

5. So if a Man make a Gift in Tail or a Leaſe for Life of Land by Deed or without Deed, reſerving a Rent, or of a Rent-Service by Deed, this is a Warranty in Law; and the Donee or Leſſee being impleaded ſhall vouch and recover in Value: And this Warranty in Law extendeth not only againſt the Donor or Leſſor and his Heirs, but alſo againſt his Aſſignees of the Reverſion; and ſo likewiſe the Aſſignee of Leſſee for Life ſhall take the Benefit of this Warranty in Law. 1 Inſt. 384. b.

6. When Dower is aſſigned, there is a Warranty in Law included, that the Tenant in Dower being impleaded, ſhall vouch and recover in Value a third Part of the two Parts whereof ſhe is dowable. Id. Ibid.

7. If a Man of a full Age and an Infant make a Feoffment in Fee with Warranty, this Warranty is not void in Part and good in Part; but it is good for the whole againſt the Man of full Age, and void againſt the Infant; for although the Feoffment of an Infant paſſing by Livery 1 Inſt. 367. b.

of Seiſin be voidable, yet his Warranty, which taketh effect only by Deed, is merely void.

1 Inſt. 386. a. 8. If a Man make a Feoffment in Fee, and bind his Heirs to Warranty, this is void, becauſe the Anceſtor himſelf was not bound: Alſo if a Man bind himſelf to Warranty, and not his Heirs, the Heirs are not bound.

Id. Ibid. 9. But a Warranty in Law may bind the Heir, although it never bound the Anceſtor.

1 Rep. 1. Lord Buckhurſt's Caſe. 10. If a Man for him and his Heirs do warrant Lands unto another and his Heirs, this is a general Warranty, becauſe it is not reſtrained to any Perſon certain.

1 Inſt. 388. b. 11. A Warranty regularly doth extend to all Things iſſuing out of the Land; that is to ſay, to warrant the Land in ſuch Plight and Manner, as it was at in the Hand of the Feoffor, at the Time of the Feoffment with Warranty, and the Feoffee ſhall vouch, as of Lands diſcharged of the Rent, *&c.* at the Time of the Feoffment made.

Id. Ibid. & 389. a. 12. If a Woman that hath a Rent-Charge in Fee, intermarrieth with the Tenant of the Land, and a Stranger releaſeth to the Tenant of the Land with Warranty, he ſhall not take Advantage of this Warranty, either by Voucher or *Warrantia Chartæ*, for the Wife, if the Huſband die, or the Heir of the Wife, living the Huſband, cannot have an Action for the Rent upon a Title before the Warranty made; for if the Heir of the Wife bring an Aſſize of Mortdanceſtor, this Action is grounded after the Warranty, whereunto, as has been ſaid, the Warranty ſhall not extend.

1 Inſt. 389. a. 13. So it is if the Grantee of the Rent grant it to the Tenant of the Land upon Condition, which maketh a Feoffment of the Land with Warranty, this Warranty cannot extend to the Rent; albeit the Feoffment was made of the Land diſcharged of the Rent, for if the Condition be broken, and the Grantor be intitled to an Action, this muſt of Neceſſity be grounded after the Warranty made.

Id. Ibid. 14. But in the Caſe aforeſaid, when the Woman Grantee of the Rent marrieth with the Tenant, and the Tenant maketh a Feoffment in Fee with Warranty, and dieth; in a *Cui in vita* brought by the Wife (as in Law ſhe may) the Feoffee ſhall vouch as of Lands diſcharged at the Time of the Warranty made, for that her Title is Paramount; ſo if a Tenant in Tail of a Rent-Charge purchaſe the Land, and make a Feoffment with Warranty, if the Iſſue bring a *Formedon* of the Rent, the Tenant ſhall vouch.

OF WASTE.

1. WASTE is the Committing any Spoil or Deſtruction in Houſes, Lands, &c. by Tenants, to the Damage of the Heir, or of him in Reverſion or Remainder: Whereupon the Writ or Action of Waſte is brought for the Recovery of the Thing waſted, and Damages for the Waſte done.

In order to ſtate the Law relative to this Head, we will conſider it under the following Diviſions.

(A) In what Subjects Waſte may be committed.
(B) Of the ſeveral Kinds of Waſte.
(C) What Acts ſhall be deemed Waſte.—And herein,

1. What ſhall be deemed Waſte in Lands.
2. What ſhall be deemed Waſte in Trees and Woods.
3. What ſhall be deemed Waſte in digging for Gravel, Mines, &c.
4. What ſhall be deemed Waſte in Gardens, Orchards, Fiſh-Ponds, Dove-Houſes, Parks, &c.
5. What ſhall be deemed Waſte with reſpect to Houſes, &c.—And herein,

Of what Things annexed to the Freehold, Waſte may be committed.

(D) What ſhall be deemed Waſte with reſpect to eccleſiaſtical Perſons.
(E) What Waſte ſhall be deemed excuſable.
(F) What Waſte ſhall be juſtifiable, by Reaſon of the Intereſt of the Party.
(G) Who may bring an Action of Waſte.
(H) Againſt whom the Action of Waſte may be brought.—Herein,

1. Againſt whom it may be brought for Waſte done by a Stranger.
2. How far it lies againſt Executors, &c.

(I) At what Time an Action of Waſte ſhall be brought.
(K) Of the Proceſs and Proceedings in Actions of Waſte.—And herein,

1. In

1. In what Caſes the Action ſhall be brought in the *Tenet.*
2. In what Caſes it ſhall be brought in the *Tenuit.*

(L) Of the Pleadings in Actions of Waſte.
(M) Of the Judgment in Actions of Waſte, and what ſhall be recovered thereby.
(N) In what Caſes in general Waſte may be reſtrained by Injunction in Equity.—And herein,

How far it may be reſtrained in Equity, notwithſtanding the Words without *Impeachment of Waſte* be contained in the Leaſe, *&c.*

(O) What Relief may be given in Equity in Caſes of Waſte.

(A) In what Subjects in general Waſte may be committed.

1. THE Statute 52 *H.* 3. *c.* 23. *ſ.* 2. *Enacts, that Farmers* *, *during their Terms, ſhall not make* † *Waſte, Sale, nor Exile of Houſe, Woods and Men.*

This Act provideth Remedy for Waſte done by Leſſee for Life, or Leſſee for Years, and it is the firſt Statute that gave Remedy in thoſe Caſes: For the Rule of the Regiſter is, that there are five Manner of Writs for Waſte, *viz.* two at the Common Law, as for Waſte done by Tenant in Dower, or by the Guardian; and three by Statute or ſpecial Law, as againſt Tenant for Life, Tenant for Years, and Tenant by the Curteſy. 2 Inſt. 145.

This Statute is a penal Law, and yet becauſe it is a remedial Law it has been interpreted by Equity. Arg. 10 Mod. 281. in Caſe of Hammond *v.* Webb.

* Here Farmers do comprehend all ſuch as hold by Leaſe for Life or Lives, or for Years, by Deed or without Deed. 2 Inſt. 145. ——It has been reſolved likewiſe that it ſhould extend to Strangers. Arg. 10. Mod. 281. in Caſe of Hammond *v.* Webb.

Altho' the Regiſter ſays *ſciend'* that *per Statutum de Marlebridge, cap.* 23. *data fuit quædam prohibitio waſti verſus tenentem annorum*, which is true; yet the Statute extends to Farmers for Life alſo, but this Act extended not to Tenant by the Curteſy, for he is not a Farmer, but if a Leaſe be made for Life or Years, he is a Farmer though no Rent be reſerved. 2 Inſt 145.

† By theſe Words they are prohibited to *ſuffer* Waſte, for it has been reſolved that this Act extends to Waſte *omittendo*, though the Word is *faciant*, which literally imports *active* Waſte. Arg. 10 Mod. 281. in Caſe of Hammond *v.* Webb.

2. *Nor of any Thing* * *belonging to the Tenements that they have to farm.*

* Houſes, Woods, and Men were before particularly named, and theſe Words do comprehend Lands and Meadows belonging to the Farm. 2 Inſt. 145.

Alſo theſe general Words have a further Signification, and therefore if there had been a Farmer for Life, or Years of a Manor, and a Tenancy had eſcheated, this Tenancy ſo eſcheated did belong to the Tenements that he held in Farm, and therefore this extended to it; and the Leſſor ſhall have a Writ generally, and ſuppoſe a Leaſe made of the Lands eſcheated by the Leſſor, and maintain it by the ſpecial Matter. 2 Inſt. 146.

3. *Unleſs they have ſpecial Licence* * *by Writing of Covenant, mentioning that they may do it.*

*This Grant ought to be by Deed, for all Waſte tends to the Diſinheritance of the Leſſor, and therefore no Man can Claim to be diſpuniſhable of Waſte without Deed. 2 Inſt. 146.

Likewiſe this ſpecial Grant is intended to be *Abſque impetitioni vaſti*, without Impeachment of Waſte. 2 Inſt. 146.

53. *Which*

53. *Which Thing if they do, and thereof be convict, they ſhall yield full Damage, and ſhall be puniſhed by Amerciament grievouſly.* And this muſt be underſtood in ſuch a Prohibition of Waſte upon this Statute as lay againſt a Tenant in Dower at the Common Law, and ſingle Damages were given by this Statute againſt Leſſee for Life, and Leſſee for Years. 2 Inſt. 146.

54. But Waſte may be committed not only in Houſes and Lands, but in Gardens, Orchards, Timber-Trees, Dove-Houſes, Warrens, Parks, Fiſh-Ponds, and other Subjects of Property, as will be ſhewn. 1 Inſt. 53. a.

(B) Of the ſeveral Kinds of Waſte.

1. THERE are two Kinds of Waſte, *viz. voluntary* or *actual*, and *negligent* or *permiſſive*. *Voluntary* Waſte may be done by pulling down or proſtrating Houſes, or cutting down Timber-Trees: *Negligent* Waſte may be by ſuffering Houſes to be uncovered, whereby the Spars or Rafters, Planches or other Timber of the Houſe are Rotten. 1 Inſt. 53. a.

2. Where *A.* leaſed a Houſe which was ruinous at the Time of the Demiſe; the Leſſee obliged himſelf not to do or ſuffer any voluntary Waſte, *&c.* The Houſe falls, and *A.* brought Debt, and it was adjudged that it lies: For it is Waſte, though the Leſſee may excuſe himſelf upon the ſpecial Matter. Dy. 38. pl. 35. Ow. 92. Glover *v.* Pipe, and a Difference was taken between an Action of Waſte, and Debt on an Obligation.

3. So where *A.* leaſed a Houſe and Land for Years by Indenture, in which was a *Clauſe, that if the Leſſee* happens to *do any Waſte*, the *Leſſor may re-enter*. The *Leſſee ſuffered the Houſe to fall for want of covering* and repairing. Though the Words were (to do any Waſte) yet *Dyer* and *Walſh* inclined that Leſſor might re-enter, becauſe ſuch Waſte is puniſhable by the Statute of *Glouceſter*, and the Words (any Waſte) is general and indifferent to either of the two Kinds of *Waſte*, viz. *voluntary or negligent*, &c. Dy. 281. pl. 21. Of this Opinion likewiſe is Lord Coke in his Comment on the Statute of Marlebridge, where he ſays,—That to do or make Waſte, in legal Underſtanding, includes negligent as well as voluntary Waſte. 2 Inſt. 145.

(C) What Acts ſhall be deemed Waſte.

1. IT has been laid down as a general Principle, that the Law will not allow that to be Waſte, which is not any Way prejudicial to the Inheritance: Nevertheleſs—— Het. 35. Barret *v.* Barret.

2. It has been held, that a Leſſee or Tenant cannot change the Nature of the Thing demiſed: Though, in ſome Caſes, the Alteration may be for the greater Profit of the Leſſor. Thus——

3. If a Leſſee converts a Corn Mill into a Fulling-Mill, it is Waſte; although the Converſion be for the Leſſor's Advantage. Cro. Ja. 182. Civit. Lond. *v.* Greyme.

4. Alſo converting a Brewhouſe of 120 *l.* *per Annum* into other Houſes let for 200 *l.* a Year, is Waſte; becauſe of the Alteration of the Nature of the Thing, and of the Evidence. 1 Lev. 309. Cole *v.* Green.

5. We

5. We will now conſider what ſhall be deemed *Waſte* with Reſpect to particular Subjects of Property.—And,

1. What Acts ſhall be deemed Waſte in Lands.

Hobart's Rep. Caſe 296. p. 234. 6. If the Tenant converts Arable into Wood, or *e converſo*, it is Waſte; for it not only changes the Courſe of Huſbandry, but alſo the Proof of Evidence.

2 Roll. Abr. 814. 7. But if a Leſſee ſuffers arable Land to lie freſh, and not manured, ſo that the Land grows full of Thorns, *&c.* this is not Waſte, but ill Huſbandry.

1 Inſt. 53. b. 8. Likewiſe the Converſion of Meadow into Arable is Waſte; for it not only changes the Courſe of Huſbandry, but the Proof of his Evidence.

2 Roll. Abr. 815. Some ſay, that 9. But if Meadow be ſometimes Arable, and ſometimes Meadow, and ſometimes Paſture, there the Plowing of it is not Waſte.

plowing muſt be prohibited by Covenant to pay ſo much an Acre, for that an abſolute Reſtraint from plowing is void.

2 Le. 174. pl. 210. 10. Neither is the Diviſion of a great Meadow into many Parcels by making of Ditches Waſte; for the *Meadows* may be better for it, and it is for the Profit and Eaſe of the Occupiers of it.

Id. Ibid. 11. Likewiſe converting a Meadow into a Hop Garden, is not Waſte; for it is employed to a greater Profit, and it may be Meadow again; *per Windham* and *Rhodes* J. but *Periam* J. ſaid, though it be a greater Profit, yet it is alſo with greater Labour and Charges.

Id. Ibid. 12. But converting a Meadow into an Orchard, is Waſte, though it be to the greater Profit of the Occupier; *per Periam.*

2 Roll. Abr. 815. 13. If a Leſſee plows the Land ſtored with Conies, this is not Waſte; unleſs it be a Warren by Charter or Preſcription.

Id. Ibid. Ow. 66. Moyle *v.* Moyle. 14. So if a Leſſee of Land deſtroys the Coney-Boroughs in the Land, it not being a free Warren by Charter or Preſcription, it ſeems is not Waſte; for a Man can have no Property in them, but only a Poſſeſſion.

1 Inſt. 53. b. 15. It is Waſte to ſuffer a Wall of the Sea to be in Decay, ſo as by the flowing and reflowing of the Sea the Meadow or Marſh is ſurrounded, whereby the ſame becomes unprofitable. But if it be ſurrounded ſuddenly by the Rage and Violence of the Sea, occaſioned by Wind, Tempeſt, or the like, without any Default in the Tenant, this is not Waſte. Yet if the Tenant repair not the Banks or Walls againſt Rivers or other Waters, whereby the Meadows or Marſhes be ſurrounded and become ruſhy and unprofitable, this is Waſte.

2 Roll. Abr. 816. 16. So *a Fortiori*, if arable Land be ſurrounded by ſuch Default: for the ſurrounding waſhes away the Marle and other Manurance from the Land.

2. What Acts ſhall be deemed Waſte in Trees and Woods.

5 Rep. 12. Saunder's Caſe. 17. Trees are Parcel of the Inheritance, and therefore if Leſſee aſſigneth his Term, and excepts the Timber-Trees, it is void; for he cannot except that which doth not belong to him by Law.

11 Rep. 48. Liford's Caſe. 18. The Leſſor, after he has made a Leaſe for Life or Years, may by Deed grant the Trees; or reaſonable Eſtovers out of them, to another and his Heirs; and the ſame ſhall take effect after the Death of the Leſſee. But ſuch a Gift to a Stranger is void during the Eſtate for Life, becauſe of the particular Prejudice which might be done to the Leſſee.

19. The

19. The Leſſee hath but a particular Intereſt in the Trees, but the general Intereſt of the Trees doth remain in the Leſſor: For the Leſſee ſhall have the Waſte and Fruit of the Trees, and the Shadow for his Cattle, &c. but the Intereſt of the Body of the Tree is in the Leſſor, as Parcel of his Inheritance. Therefore—— 11 Rep. 48. Liford's Caſe.

20. If Trees are overthrown, by the Leſſee or any other, or by Wind or Tempeſt, or by any other Means disjointed from the Inheritance, the Leſſor ſhall have them in reſpect of his general Ownerſhip. 11 Rep. 81. Bowles's Caſe.

21. With reſpect to Timber Trees, ſuch as Oak, Aſh, and Elm, (which are Timber Trees in all Places) Waſte may be committed in them, either by cutting them down, or topping of them, or doing any Act whereby the Timber may decay. Alſo in Countries where Timber is ſcant, and Beeches or the like are converted to Building for the Habitation of Man they are alſo accounted Timber. Thus—— 1 Inſt. 53. a. 54. b.

22. Waſte may be committed in cutting of Beeches in *Buckinghamſhire*, becauſe there by the Cuſtom of the Country it is the beſt Timber. 2 Roll. Abr. 814.

23. So Waſte may be committed in cutting of Birches in *Berkſhire*, becauſe they are the principal Trees there for the moſt part. Id. Ibid.

24. If the Tenant cut down Timber-Trees, or ſuch as are accounted Timber, as is aforeſaid, this is Waſte; and if he ſuffer the young Germins to be deſtroyed, this is Deſtruction. So it is, if the Tenant cut down Underwood (as he may by Law,) yet if he ſuffer the young Germins to be deſtroyed, or if he ſtub up the ſame, this is Deſtruction. 1 Inſt. 53. a.

25. If a Leſſee or his Servants ſuffer a Wood to be open, by which Beaſts enter and eat the Germins, though they grow again, yet it is Waſte; for after ſuch eating they never will be great Trees, but Shrubs. 2 Roll. Abr. 815.

26. If a Termor cuts down Underwood of Hazel, Willows, Maple, or Oak, which is ſeaſonable it is not Waſte. 2 Roll. Abr. 817. *If uſually cut and* ſold every ten Years, it is no Waſte; but if he dig them up by the Roots, or ſuffer the Germins to be bitten with Cattle after they are felled, ſo as they will not grow again, the ſame is a Deſtruction of the Inheritance, and Waſte lies for it. And mowing the Stocks with a Wood Scythe is a malicious Waſte; and continual mowing and biting, is Deſtruction. Godb. 210. pl. 298. Sir John Gage *v.* Smith.

27. If Aſhes are ſeaſonable Wood to cut from ten Years to ten Years, it is not Waſte to cut them down for Houſe-Boot. Id. Ibid.

28. But if the Aſhes are groſs of the Age of nine Years, and able for great Timber, it is Waſte to cut them down. Id. Ibid.

29. If Oaks are ſeaſonable, and have been uſed to be cut always at the Age of twenty Years, it is not Waſte to cut them down at ſuch Age, or under, for in ſome Countries, where there is great Plenty, Oaks of ſuch Age are but ſeaſonable Wood. Id. Ibid.

30. But after the Age of twenty Years, Oaks cannot be ſaid to be Wood ſeaſonable, and therefore it ſhall be Waſte to cut them down. Id. Ibid.

31. Cutting down of Willows, Beech, Birch, Aſp, Maple or the like, ſtanding in the Defence and Safeguard of the Houſe, is Deſtruction. If there be a quickſet Fence of white Thorn, if the Tenant ſtub it up, or ſuffer it to be deſtroyed, this is alſo Deſtruction: And for all theſe and the like Deſtructions, an Action of Waſte lieth. 1 Inſt. 53. a.

32. The cutting of Horn-Beams, Hazels, Willows, Sallows, though of forty Years Growth is no Waſte, becauſe theſe Trees would never be Timber; *per Meade* J. Godb. 4 pl. 6.

33. If the Leſſee covenant, that he will leave the Wood at the End of the Term as he found it; if the Leſſee cut down the Trees, the Leſſor ſhall preſently have an Action of Covenant: For it is not poſſible for him to leave the Trees at the End of the Term. So that the Impoſſibility of performing the Covenant ſhall give a preſent Action on a future Covenant. But it is otherwiſe in the Caſe of a Houſe; for there, tho' the Leſſee commit Waſte, yet he may repair the Waſte done, before the Term expires. 7 Rep. 15. Engleſield's Caſe. 5 Rep 21. Mayne's Caſe.

1 Inſt. 53. b. Hubart's Rep. C. 296.

34. The *Cutting of Trees* is Juſtifiable *for Houſe-boot, Hay-boot, Plow-boot, and Fire-boot.*

Br. Waſte 130. By the Common Law, the Leſſee ſhall have them, though the Deed does not expreſs it; but if he *takes more than is neceſſary*, he ſhall be puniſhed in Waſte. Br. Waſte, pl. 130.—A Termor may take Wood for them, becauſe they belong to him of Common Right. F. N. B. 59. (N.) And Ibid. in the new Notes there (*i*) ſays, he may take Oaks, Elms, Aſh, &c. for Repairs of the Houſe, and Underwood, &c. for Incloſures and Firing.———Covenant by Leſſor that Leſſee ſhall have Houſe-boot, Hay-boot, and Fire-boot, without committing any Waſte, on Pain of forfeiting the Leaſe, is no more than what the Law appoints, and therefore the *Covenant* is vain. Cro. E. 604. pl. 18. Archdeacon *v.* Jennor.

If Leſſee *juſtifies* in Waſte for *cutting Oaks for Fire-boot, he muſt ſurmiſe that there was no Underwood upon the Land*; ſo it ſeems where he takes Aſh, or other Trees which are Timber. Br. Waſte, pl. 89.—And by the beſt Opinion, *Oak and Aſh under the Age of ſixteen Years*, may be cut for Fire-boot. Ibid.

Leſſee for Life or Years, by the Common Law, cannot take Fuel but of *Buſhes and ſmall Wood*, and not of Timber-Trees; *But if Leſſor in the Leaſe grants Fire-boot expreſsly*, then if Leſſee cannot have ſufficient Fuel as above, &c. he may take great Trees. 3 Le. 16. Anon'.

1 Inſt. 53. b. In an Action of Waſte for cutting Trees, the Defendant juſtifies, &c.

35. The Tenant may take *ſufficient Wood to repair the Walls, Pales, Fences, Hedges, and Ditches as he found them*; but he cannot make new. That they were *to make a Fence with Pale*: And by *Hubard*, It was good, *without ſhewing that the Fence was made of Pale*, &c. *and now in decay*. Noy 23. Jenkins *v.* Jenkins.

1 Inſt. 53. Id. Ibid.

36. Cutting of dead Wood is no Waſte.

37. But converting Trees into Coals for Fuel, where there is ſufficient dead Wood, is Waſte.

3. What ſhall be deemed Waſte, in digging for Gravel, Mines, &c.

1 Inſt. 53. b. But no where it is for Reparation.

38. If the Tenant digs for Gravel, Lime, Clay, Brick-Earth, or Stone hid in the Ground, or for Mines of Metal or Coal, or the like, not being open at the Time of the Leaſe, it is Waſte.

See Poſt. 5. *What ſhall be deemed Waſte with reſpect to Houſes.*

1 Inſt. 54. b.

39 If a Man hath Land in which there is a Mine of Coals, or the like, and maketh a Leaſe of the Land, (without mentioning any Mines) for Life or for Years, the Leſſee for ſuch Mines as were open at the Time of the Leaſe made, may dig and take the Profits thereof. But he cannot dig for any new Mine that was not open at the Time of the Leaſe made, for that would be adjudged Waſte.

Id. Ibid.

40. Likewiſe if there be open Mines in the Land, and the Owner leaſes it to another, *with the Mines in it*, he may dig in the open Mines, but not in the cloſe Mines; but otherwiſe it would be if there was not any open Mine there; for then the Leſſee might dig for Mines, otherwiſe the Grant would take no Effect.

2 Roll. Abr. 816.

41. If a Leſſee digs Slate-Stone out of the Land, it is Waſte. And,

Ow. 66. Moyle *v.* Moyle.

42. Digging for Stones, unleſs in an antient Quarry, is Waſte, though the Leſſee fill it up again.

5 Rep. 12. a. b. Sander's Caſe.

43. Likewiſe, if he have a Leaſe of Land, in which there was a Coal-Mine, but not open at the Time of the Leaſe; if the Leſſee open it, and aſſigns his Intereſt, it is ſtill Waſte in the Aſſignee; but where the Leaſe is of Lands, and all Mines in it, there the Leſſee may dig in it.

2 Roll. Abr. 816.

44. But if Leſſee of Land, with Mines of Coals, Iron, and Stone, digs the Coals, Iron, and Stones, ſo much as is neceſſary for him to uſe without ſelling, it is not Waſte.

Id. Ibid.

45. If a Leſſee digs the Earth, and carries it out of the Land, Action of Waſte lies.

46. If

46. If a Leſſee digs for Gravel or Clay, for Reparation of the Houſe, not being open at the Time of the Leaſe, it is not Waſte; any more than the cutting of Trees for Reparation. 1 Inſt. 53. b.

4. What ſhall be deemed Waſte in Gardens, Orchards, Fiſh-Ponds, Dove-Houſes, Parks, &c.

47. If the Tenant cut down or deſtroy any Fruit-Trees, growing in the Garden or Orchard, it is Waſte: But if ſuch Trees grow upon any of the Ground, which the Tenant holdeth out of the Garden or Orchard, it is no Waſte. 1 Inſt. 53. a.

48. Breaking a Hedge alſo is not Waſte. Id. Ibid.

49. Likewiſe, Deſtruction of *Saffron Heads in a Garden*, is not Waſte. Br. Waſte pl. 143. cites 10 H. 7. c. 2.

50. If the Tenant of a Dove-Houſe, Warren, Park, Vivary, Eſtangues, or ſuch like, takes ſo many that ſo much Store is not left as he found at the Time of the Demiſe, it is Waſte. 1 Inſt. 53. a. Hob. Rep. C. 296.

51. Likewiſe, if the Leſſee of a Pigeon-Houſe ſtops the Holes, that the Pigeons cannot build, it is Waſte. 1 Inſt. 53. a.

52. So likewiſe, ſuffering the Pales of a Park to decay, whereby the Deer are diſperſed; is Waſte. Id. Ibid.

53. Alſo, if the Leſſee of a Hop-Ground plow it up and ſow Grain there, it is Waſte. Ow. 66. Moyle v. Moyle.

54. The *breaking a Weare* is Waſte, and ſo of the *Banks of a Fiſh-Pond*, ſo that the Water and Fiſh run out. Ow. 67. Moyle v. Moyle.

5. What ſhall be deemed Waſte with Reſpect to Houſes.

55. Waſte may be done in Houſes, by pulling them down or proſtrating them, or by ſuffering the ſame to be uncovered, whereby the Spars or Rafters, Plaunches or other Timber of the Houſe are rotten. 1 Inſt. 53. a.

56. Default of Coverture of an Houſe, is Waſte, though the Timber be ſtanding. 2 Roll. Abr. 815.

57. But if the Houſe be uncovered, when the Tenant cometh in, it is no Waſte in the Tenant to ſuffer the ſame to fall down. 1 Inſt. 53. a.

58. Though there be no Timber growing upon the Ground, yet the Tenant at his Peril muſt keep the Houſes from waſting. 1 Inſt. 53 a.

59. If a Leſſee raſes the Houſe, and builds a new Houſe, if it be not ſo long and wide as the other, it is Waſte. 2 Roll. Abr. 815. But if the old Houſe falls by being ruinous, and the Leſſee builds a new one, it needs not be ſo long and wide as the old one. Br. Waſte, pl. 93.

60. So if he rebuilds it more large than it was before, it is Waſte; for it will be more Charge for the Leſſor to repair it. 1 Inſt. 53. a.

61. But if a Leſſee of Land makes a new Houſe upon the Land where there was not any before, this is not Waſte; for it is for the Benefit of the Leſſor. But according to Lord Coke— 2 Roll. Abr. 815.

62. If the Tenant build a new Houſe, it is Waſte; and if he ſuffer it to be waſted, it is a new Waſte.—Yet if the Houſe be proſtrated by Enemies or the like, without a Default of the Tenant, or was ruinous at his coming in, and fall down, the Tenant may build the ſame again with ſuch Materials as remain and with the other Timber, which he may take growing on the Ground, for his Habitation, but he muſt not make the Houſe larger than it was. 1 Inſt. 53. a. Ld. Coke perhaps is here to be underſtood of building a new Houſe in the Room of one which was before on the Premiſſes; and thus Rolle and he may be reconciled.

63. If

1 Inſt. 53. a. 63. If the Houſe be uncovered by Tempeſt, the Tenant muſt in convenient Time repair it.

2 Roll. Abr. 815. 64. If a Leſſee flings down a Wall between a Parlour and a Chamber, by which he makes a Parlour more large, it is Waſte; becauſe it cannot be intended for the Benefit of the Leſſor, nor is it in the Power of the Leſſee to tranſpoſe the Houſe.

Br. Waſte, 143. 65. So if he pulls down a Partition between Chamber and Chamber, it is Waſte.—Or.

2 Roll. Abr. 815. 66. If a Leſſee pulls down a Hall or Parlour, and makes a Stable of it, it is Waſte.

Id. Ibid. 67. If a Leſſee pulls down a Garret over head, and makes it all one and the ſame Thing, it is Waſte.

Id. Ibid. 68. If a Leſſee permits a Chamber *fore in decaſu pro defectu plauſtrationis, per quod groſſum maheremium devenit putridum, & camera ill turpiſſima & fœdiſſima devenit*, Action of Waſte lies for it.

Id. Ibid. 69. So if a Leſſee permits the Walls to be in Decay for Default of daubing, *per quod maheremium devenit putridum*, Action of Waſte lies.

Br. Waſte, pl. 94. 70. *Breaking of a Pale* or of a Wall uncovered, is not Waſte.

Id. Ibid. 71. But *breaking of a Wall covered with Thatch, and of a Pale of Timber covered*, is Waſte.

72. Burning the Houſe by Negligence or Miſchance, is Waſte.

1 Inſt. 53. b.
But by the 6 *Anne*, *c.* 31. no Action is to be proſecuted againſt any Perſon in whoſe Houſe or Chamber any Fire accidentally begins.

1 Inſt. 53. a. 73. If the Tenant do or ſuffer Waſte to be done in Houſes, yet if he repair them before any Action brought, there lieth no Action of Waſte againſt him, but he cannot plead, *Quod non fecit Vaſtum*, but the ſpecial Matter.

6. Of what Things annexed to the Freehold Waſte may be committed.

42 E. 3. 6. Of Poſts, &c. 74. The removing of a Poſt in a Houſe, is Waſte.
fixed in the Land, and not to the Walls by Termor, and taken off within his Term, Waſte does not lie, for the Houſe is not impaired by it. *Per Kingſmill* J. and *Grevill* Serj. *Quod non Negatur.* Br. Waſte, pl. 104.

Id. Ibid. 75. So the removing of a Door.
1 Inſt. 53.
In Waſte of taking away Doors, the Leſſee pleaded, that he erected them, and the Court took a Difference between outer Doors and inner Doors. *Per* 3 *J.* Leſſee may take away the inner Doors within the Term, but not the outer Doors. Mo. 177. pl. 315. Cook's Caſe, *alias* Cook *v.* Humphery.

42 E. 3. 6. 76. So the removing of a Window.
It is Waſte,
though the Glaſs Window be glazed by the Tenant himſelf. 1 Inſt. 53. a.

Br. Waſte, pl. 143. 77. The digging up a Furnace annexed to the Franktenement, and ſo ſelling it, is Waſte.
tho' annexed by the Tenant himſelf. 1 Inſt 53. a. The Difference is between a Furnace fixed to the Middle or to the Wall of the Houſe; and in the firſt Caſe the Leſſee may take it away, but not in the laſt. *Per Dyer* and *Owen*. J. Ow 71. in Caſe of Day *v.* Auſtin.

A Furnace fixed *in Medio Domus* is but a Chattel, and removeable; but otherwiſe, if fixed to the Walls. *Per Walmſley*. Said to have been agreed in *Dyer*'s Time. Cro. E. 374. in Caſe of Day *v.* Biſbich. So of Dyer's Fat fixed to the Walls adjudged not removeable on an Attachment. Cro. E. 374. pl. 24. Day *v.* Biſbich.

78. The

78. The removing of a Bench is Waſte, though annexed by the Tenant himſelf. Br. Waſte, pl. 143. 1 Inſt. 53. a.

79. If Wainſcot annexed to the Houſe be taken away, it is Waſte. Id. Ibid. Tho' annexed by the Tenant himſelf. Id. Ibid. If fixed to a Wall, it is Waſte. Per Anderſon, Cro. E. 374. in Caſe of Day *v.* Biſbich. Wainſcot annexed by the Leſſor or Leſſee, is Parcel of the Houſe, and whether by great or little Nails, Screws or Irons, put through the Poſt or Walls of the Houſe, is all one; but if by any Way whatever it be fixed to the Poſt or Walls of the Houſe, it is Waſte for Leſſee to remove them; and ſhall paſs by Grant of the Houſe in the ſame Manner as the Cieling and Plaiſtering, 4 Rep. 64. cites it as reſolved. Mich. 41 & 42 Eliz. C. B. by the whole Court, in Caſe of Warner *v.* Fleetwood. But per Dodderidge J. Wainſcot may as well be removed by a Leſſee as Arras Hangings. Roll. 216. in Bridgman's Caſe.

80. Of Tables dormant and fixed in the Land, and not to the Walls by Termor, and taken off within his Term, Waſte does not lie; for the Houſe is not impaired by it. *Per Kingſmill* J. and *Grevil* Serj. Br. Waſte, pl. 104. Tables dormant fixed cannot be removed, and if they are it is Waſte. Per Anderſon C. J. Cro. 374. pl. 24. E. in Caſe of Day *v.* Biſbich.

81. Beating down a Wooden Wall, or ſuffering a Brick Wall to fall, is no Waſte, unleſs it be expreſsly alledged, that the Walls were coped or covered. Dy. 108. b. pl. 31. Earl of Bedford *v.* Smith. So of a Mud Wall, is Waſte. Br. Waſte, pl. 143.

82. If Waſte be aſſigned in pulling up a Plank Floor and Mangers of a Stable, Plaintiff muſt ſhew that the ſame were fixed. Id. Ibid.

83. If Leſſee erects a Partition, he cannot break it down without being liable to an Action of Waſte, for he has joined it to the Franktenement. Mo. 178. Cooke's Caſe.

84. Shelves are Parcel of the Houſe, and not to be taken away; and though it is not ſhewed that the Shelves were fixed, it ought to be intended that they were fixed. *Per Coke* Ch. J. 2 *Bulſt.* 113. Lady *St. John* v. *Pyot.* Cro. E. 329. Pyot *v.* Lady St. John.

85. Pavement is a Structure, for they uſe Lime to finiſh it. Id. Ibid. And held that it is within the Intention of the Covenant for repairing Edifices, Buildings, and it is *quaſi* Building.

86. If the Tenant ſuffers the Groundſels to Waſte in his Default of Defence or removing the Water from off them, or of Dirt or Dung or other Nuſance which lies or hangs upon it, the Tenant ſhall be charged, for he is bound to keep it in as good Caſe as he took it. Ow. 43. Stickleborne *v.* Hatchman. If by not ſcowering a Ditch or Moat the Groundſels of the Houſe are putrified, Waſte ſhall be aſſigned *in Domibus pro non ſcourando.* Id. Ibid.

(D) What ſhall be deemed Waſte, with Reſpect to eccleſiaſtical Perſons.

1. WITH Reſpect to eccleſiaſtical Perſons, it has been held, that an Action on the Caſe will lie for Dilapidations. And —— 3 Lev. 268. Jones *v.* Hill.

2. It has been ſaid that Dilapidation of eccleſiaſtical Palaces, Houſes, and Buildings, is a good Cauſe of Deprivation. 3 Inſt. 204.

3. If

11 Rep. 49. cites as the Biſhop of Durham's Caſe.

3. If a Biſhop cuts and ſells the Trees of the Biſhoprick, *for this Waſte, a Prohibition ſhall be granted, commanding him to ceaſe doing ſuch Waſte.* Reſolved in Parliament.

11 Rep. 49. Liford's Caſe. The Patron may have the Prohibition.

4. So if a Parſon or Vicar waſte the Trees of his Parſonage or Vicarage, a Prohibition ſhall be granted; for it is the Dowry of the Church.

5. So if a Prebendary waſte the Trees of his Prebend, the Patron may have a Prohibition. Between *Ackland and Atwell*, Prohibition granted by the Lord *Coventry*, Lord Keeper, for the Prebend of *Catton* and *Devon.*

Godb. 259. pl. 357. Saliſbury Biſhop's Caſe.

6. It has been holden, that if a Biſhop, Parſon, or other *eccleſiaſtical Perſon, cuts down Trees* upon the Lands, *unleſs* it be *for Reparation* of their eccleſiaſtical Houſes, and do, or ſuffer to be done any Dilapidations, that they may be puniſhed for the ſame in the Eccleſiaſtical Court, and a Prohibition will not lie in the Caſe; and that the ſame *is a good Cauſe of Deprivation* of them of their Eccleſiaſtical Livings and Dignities. But yet for ſuch Waſte done, *they may be alſo puniſhed by the common Law*, if the Party will ſue there.

Lev. 107. Counteſs of Rutland's Caſe.

7. On a Motion for Prohibition, the Suggeſtion appeared to be, that the Parſon had *dug and found Lead Mines in his Glebe, and had felled Timber*; and it was inſiſted that this was Waſte, and prohibitable by 35 *E.* 1. *De non proſternend' Arbores, &c.* But *per Cur.* it lies not for Mines; for then Mines in Glebe-Land can never be opened.

(E) What Waſte ſhall be deemed excuſeable.

1 Inſt. 53. a. 1.

IT may be obſerved in general, that Waſte which enſues from the Act of God is excuſable. Thus,

But if it be *uncovered by Tempeſt, and ſtands*,

2. If a Houſe falls by Tempeſt, the Tenant ſhall be excuſed in Action of Waſte.

there, if the *Tenant has ſufficient Time to repair it*, and does not, the Leſſor, if the Leaſe be made on Condition of Re-entry for Waſte, may re enter, but not immediately upon the Tempeſt; for it is no Waſte till the Tenant ſuffers it to be ſo long unrepaired, that the Timber be rotted; *per* Hull; and then it is Waſte. Br. Conditions, pl. 40.——If he *ſuffers it to continue unrepaired, ſo that at laſt the Houſe is caſt down by a Tempeſt*, it is Waſte. Mo. 62. pl. 173.

1 Inſt. 53. a.

3. Likewiſe, if a Houſe be abated by Lightning, or thrown down by a great Wind, it is not Waſte.

Br. Waſte, pl. 39.

4. So if Apple-Trees are torn up by a great Wind, if Leſſee afterwards cuts them, it is not Waſte.

2 Roll. Abr. 820. Contra. 20 H. 6. c. 1. b. Leſſee for Years *covenanted*, upon a Penalty of 10l. *to repair the Banks of a River.* They were afterwards broken down by a *ſudden outrageous Flood.* Fitzherbert and Shelly held, That he is excuſed the Penalty, becauſe it is the Act of God; but he is bound by his Covenant to repair it, which he muſt do in convenient Time. Dy. 33. a. pl. 10, 11.

5. If the Banks are well repaired by the Leſſee, and the Water notwithſtanding ſubverts them, and ſurrounds his Meadow, by which it is become ruſhy, it is not Waſte.

If Banks *on the River Trent* are *unrepaired*, it is Waſte; *per* all the Juſtices; becauſe the Trent is not ſo violent, but that the Leſſee by his Policy and Induſtry may well enough preſerve the Banks, and make the Water to run within its Bounds; but the Violence of the Sea is ſuch, that it cannot be reſtrained by any Policy, and therefore it is no Waſte if that by Tempeſtuouſneſs breaks the Walls and ſurrounds the Land. Mo. 69. pl. 187. Griffith's Caſe.

6. The

6. The Leſſor cannot give Trees during the Tenant's Leaſe. But if he grants them to a Stranger, and commands the Tenant to cut and deliver them, who does it, this ſhall excuſe him in an Action of Waſte. And yet the Tenant was not bound by Law to obey and execute this Command. Br. Done, &c. pl. 13.

(F) What Waſte ſhall be deemed juſtifiable, by Reaſon of the Intereſt of the Party.

1. TENANT in Tail may commit Waſte in Houſes as well as in all other Parts of the Eſtate, notwithſtanding any Reſtraint to the contrary, and no Inſtance can be ſhewn, where a Tenant in Tail has been reſtrained from committing Waſte by Injunction of the Court of Chancery. Caſ. Temp. Ld. Talb. 16. Glenorchy v. Boſville. And his Lordſhip ſaid, an Injunction was refuſed, in Mr. *Saville*'s Caſe of *Yorkſhire*, who being an Infant, and Tenant in Tail in Poſſeſſion, and in a very bad State of Health, and not likely to live to full Age, cut down by his Guardian a great Quantity of Timber, juſt before his Death, to a very great Value; the Remainder-Man applied here for an Injunction to reſtrain him, but could not prevail. Ibid.

2. If *Tenant in Tail* grants all his Eſtate, *his Grantee* is diſpuniſhable of Waſte; ſo ſuch *Grantee's Grantee* is alſo diſpuniſhable; *per Clerk* J. 3 Le. 121. pl. 173. Anon.

3. If a Man *deviſes Land to two in Tail*, and after the *one* Deviſee *dies without Iſſue*, by which the Reverſion in Fee of one Moiety reverts to the Heir of the Donor; but the *other* Deviſee is Tenant for Life of the whole, and after he *commits Waſte*, Action of Waſte lies againſt him by the Heir of the Donor for the one *Moiety*. Lands were given to *A.* and *B.* and the Heirs of *their two Bodies* A. *died without Iſſue*, and the Remainder of the Half *reverted* to the Donor. He brought Waſte againſt *B.* of Houſes and Lands to him demiſed, and agreed that the Writ was good; but it was queſtioned if the Count ſhall be general, or of a Half only, notwithſtanding that both were Tenants in Common of the Reverſion. 2 Brownl. 133. Mallet *v.* Mallet.

4. But Action of Waſte does not lie againſt *Tenant in Tail after Poſſibility*, for the Greatneſs of the Eſtate of Inheritance which was once in him; and alſo, as ſome ſay, becauſe the Eſtate was *not within the Statute at the Creation*. 11 Rep. 80. a. Lewis *v.* Bowles. But ſuch Tenant ſhall not have the Trees, *&c.* which he cuts. 4 Rep. 63. Herlakenden's Caſe.——And ſuch Tenant may be reſtrained in Equity. See *Poſt*.

5. If Lands are given to the Huſband and Wife, and to the Heirs of the Body of the Huſband, the Remainder to the Huſband and Wife, and to the Heirs of their two Bodies begotten; and the Huſband dies without Iſſue: The Wife ſhall not be Tenant in Tail after Poſſibility; for the Remainder in ſpecial Tail was utterly void, for that it could never take Effect. For ſo long as the Huſband ſhould have Iſſue, it ſhould inherit by Force of the general Tail; and if the Huſband die without Iſſue, then the ſpecial Tail cannot take Effect, inaſmuch as the Iſſue which ſhould inherit in ſpecial Tail, muſt be begotten by the Huſband; and ſo the general, which is larger and greater, hath fruſtrated the ſpecial, which is leſſer; and the Wife, in that Caſe, ſhall be puniſhed for Waſte. 1 Inſt. 28. b.

6. It

Br. Waſte, pl. 114. Tenant at Will cannot

6. It has been agreed, that *Tenant for Years may cut Wood*; but it has been doubted, if *Tenant at Will may*; but it ſeems, that as long as Tenant at Will is not countermanded he may cut ſeaſonable Wood, *&c.*

juſtify cutting Underwood, without Licence; *per Littleton.* Br. Waſte, pl. 131.

Br. Waſte, pl. 126.

7. Where a Man *leaſes a Wood, which conſiſts only of great Trees*, the Leſſee cannot cut them.

Hobart's Rep. Caſe 296. 1 Inſt. 54. b.

8. But a Leſſee may juſtify the *cutting of Trees for Reparation of Houſes.*

But in ſuch Caſe the Termor ſhall *pay the Wages and Salary of the Workmen out of his own Money*, and not cut Wood to ſell to pay the Wages. Br. Waſte, pl. 112.—And if he cuts Trees for Reparations, and *ſuffers the Trees to lie and putrify*, it is Waſte. Br. Waſte, pl. 112.

1 Inſt 53. b.

9. Nevertheleſs, *if Leſſee cuts Trees for Reparation, and ſells them, and after buys them again, and employs them for Reparation*, yet it is Waſte by the Sale.

Id. Ibid.

10. So if Leſſee *cuts Trees, and ſells them* for Money, *though with the Money he repairs the Houſe*, yet it is Waſte.

Mo. 23. pl. 80. Anon. If *Leſſor covenants to*

11. As to the cutting of Timber Trees for Repairs by Leſſee, there is no *Difference* whether the *Leſſor or Leſſee covenants to repair* the Houſes; for in either Caſe it is not Waſte, if Leſſee cuts them.

repair the Houſes, and does not, Leſſee may cut down Trees for the repairing of the Houſes. Brownl. 240. Anon.

1 Inſt. 53 a. —If *Strangers, Enemies of the King*, deſtroy a Houſe,

12. If a *Houſe be proſtrated by Enemies of the King*, or ſuch like, *without Default of the Leſſee*, the Leſſee may rebuild it again with the ſame Materials that remain, and may *cut other Timber* upon the Land to rebuild it, but he muſt not make the Houſe larger than it was.

Waſte does not lie; But *contra* if it be *by traiterous Subjects* of the King. Br. Waſte, pl. 15.

1 Inſt 53. a. Br. Waſte, pl. 130.

13. *So*, if the Houſe *was ruinous at the Time of the Leaſe, and fell within the Term*, this is not Waſte in the Tenant.

Hobart's Rep. Caſe 296.

14. *But* the Leſſee ſhall *not* cut Trees to make *a new Houſe where there was not any at the Time of the Leaſe.*

Br. Waſte, pl. 39.

15. So if a Leſſee *ſuffers a Houſe to fall for default of Covering*, which is Waſte, he *cannot cut Trees to repair the Houſe.*

1 Inſt. 53. b. —And in ſuch Caſe

16. And in general, if the *Tenant ſuffer the Houſe to be waſted*, he cannot juſtify the ſelling of Timber to repair it.

the ſelling Timber to repair the ſame, is double Waſte. Ibid.

1 Inſt. 54. *b.* If the Tenant *covenants to*

17. If a *Houſe be ruinous at the Time of the Leaſe, though the Leſſee is not bound to repair it*, yet he *may cut Trees to repair it.*

repair ſuch ruinous Houſe, he may take Trees for it. Br. Waſte, pl. 130. cites 12 H. 8. 1.

1 Inſt. 53. b.

18. The Tenant likewiſe may *dig for Gravel or Clay for Reparation of the Houſe*, though the Soil was not open when the Tenant came in; and it is juſtifiable as well as cutting of Trees.

Br. Waſte, pl. 97.

19. So with regard to *a Stable, if it fall without Default of the Leſſee in the Time of the Leſſor*, the Leſſee *may take Trees in the Time of the Heir to make a new Stable, if it be of Neceſſity.*

20. But

20. *But* if the Stable falls *in Default of the Leſſee*, in Time of the Leſſor, he cannot, in Time of the Heir, cut Trees to make a new Stable. Br. Waſte, pl. 67. Iſſue was taken whether it was well repaired in the Time of the Plaintiff (the Heir) and fell in the Time of the Plaintiff, in Default of the Defendant.

21. Cutting *Wood to burn, where the Tenant has ſufficient Hedgwood*, is Waſte. F. N. B. 59. (M).

22. Where Leſſee for Years has Power to take Hedge-boot *by Aſſignment*, yet he may take it without Aſſignment; for the Affirmative does not take away the Power which the Law gives him. Dy. 19. pl. 115. Anon.

23. If *Leſſor except his Trees* in his Leaſe, the Leſſee ſhall not have Fire-boot, Hay-boot, *&c.* which he ſhould have otherwiſe; and the Property of the Trees is in the Leſſor himſelf. 4 Le. 162. pl. 269. Sir Rd. Lewkner's Caſe. Upon ſuch Reſervation, Waſte will not lie againſt the Tenant for cutting Trees, becauſe they are not Parcel of the Thing leaſed, but Treſpaſs lies in ſuch Caſe. Dy. 19. pl. 110.

24. Yet it has been ſaid, that *Leſſee for Years, the Trees being accepted*, has Liberty to take the *Shrowds and Loppings* for Fire-boot; but if *he cuts any Tree*, it ſhall be *Waſte, as well for the Lopping as for the Body* of the Tree. Noy 29. Rich *v.* Makepeace.

25. If a Tenant that has Fire-boot to his Houſe *in another Man's Land*, cuts Wood for that Intent to take his Boot Wood, and *the Owner* of the Land *takes it away*, an Action of Trover and Converſion lies againſt him by the Tenant of the Land who hath ſuch Fire-boot. Clayt. 40. pl. 99. Coram Barkley. Anon'.

26. If the *Leſſor is bound in a Bond of* 100*l.* and the *Leſſee cuts twenty Oaks, and ſells them, and pays the Obligee* for his Leſſor, yet Waſte lies againſt him for cutting them down, though the Money was applied to the Uſe and Profit of the Leſſor. Dy. 36. b. pl. 38. Maleverer *v.* Spinke.

27. If *A.* hath Common of Eſtovers in the Wood of *B.* for Houſe-boot, and he cuts down four Trees for that Purpoſe, and *in the Working they prove unfit* for the Uſe, as for Poſts of a Houſe, *&c.* It was held, that *A. cannot convert* this Timber to *any other Uſe*, &c. neither can he ſell and buy other fit Wood with the Money; and he cannot enlarge the Houſe with this Timber, nor board the Sides of the Barn there which had Mud-Walls, or the like before. Clayt. 47. pl. 81. Coram Barkley, Earl of Pembroke's Caſe.

28. *Where a Rent is granted in Fee*, with a *Proviſo to enter and retain till ſatisfied of the Profits*; the Grantee, upon Entry, cannot cut Trees or do Waſte; *per* three Juſtices. 1 Lev. 171. Jemmet *v.* Cooley.

29. Cutting of *dead Wood*, is no Waſte. F. N. B. 59. (M).

30. If a Man leaſes Land with general Words of *all Mines of Coals, where there is not any Mine of Coals open at the Time of the Demiſe, and after the Leſſee opens a Mine*, he cannot juſtify the *cutting of Timber-Trees for making of Puncheons, Corſes, Rolls, Roll-Scopes and other Utenſils* in and about the ſaid Mine, though without them he could not dig and get the Coals out of the Mine: And this is like to a *new Houſe built after the Demiſe*, for the Reparation of which he cannot take Timber upon the Land; and it had been Waſte to open it, if it had not been granted by expreſs Words: And it was ſaid by *Hobart*, That the Law had been the ſame if the Mine was open at the Time of the Demiſe. Hobart's Rep. C. 296. Ld. Darcy *v.* Aſhwith. And ſee Hutt. 19. Where the Caſe is more clearly reported.

(G) Who may bring an Action of Waſte.

1. BY 13 *Edw.* 1. *c* 22. *the Action of Waſte is given to one Tenant in common againſt* another *.

* Theſe Words include as well Joint-Tenants as Tenants in common, for both of them hold *in communi*; and ſo do old Books and Records term them both. But though the Generality of theſe Words do extend to Coparceners, yet in good Conſtruction they are not within the Purview of this Act, becauſe they were compellable to make Partition; for this Act extends not to them that had Remedy by the Common Law.

Br. Waſte, pl. 79. 2. Where there are Tenants in Common for Life, the one ſhall not have Treſpaſs of Trees cut againſt the other, but ſhall have Waſte *pro indiviſo*, though they are only Tenants for Term of Life, *&c.* but the one may have Treſpaſs of Corn cut againſt the other.

11 Rep. 49. a. Liford's Caſe. 3. If one Coparcener before Partition makes Feoffment to another, and one of them does Waſte in the Trees, Waſte lies.

2 Roll. Abr. 828. 4. Likewiſe, if two Jointenants do Waſte, and after the *one enters into Religion*, Waſte lies againſt the other alone.

It is queſtioned if this is not an Ordinance only. See Maynard's Ed. 2. 231, 273, 274. 5. By the 20 *Ed.* 1. *St.* 2. *an Action of Waſte is maintainable by the Heir for Waſte done in the Time of his Anceſtors, as well as for the Waſte done in his own Time.*

1 Inſt. 53. b. 285. a. 6. This Action muſt be brought by him that hath the immediate Eſtate and Inheritance in Fee-ſimple or Fee-tail, but ſometimes another may join with him.

1 Inſt. 53. b. 356. a. 2 Rol. Abr. 825. 7. It is ſaid, that the Reverſion muſt continue in the ſame State that it was at the Time of the Waſte done, and not granted over; for though the Reverſioner taketh the Eſtate back again, the Action is gone, becauſe the Eſtate did not continue: But in ſome ſpecial Caſes an Action of Waſte ſhall lie, though the Leſſor had nothing in the Reverſion at the Time of the Waſte done; for if a Biſhop makes a Leaſe for Life or Years and dies, and the Leſſee, the See being void, doth Waſte, the Succeſſor ſhall have an Action of Waſte. This is allowed upon a particular Reaſon. A Purchaſer ſhall have an Action of Waſte, though the Statute of 20 *Ed.* 1. ſpeaks of thoſe that are Inheritors.

1 Inſt. 341. a. 1 Inſt. 53. b. 356. a. 8. A Tenant for Life cannot have this Action, but a Parſon, *&c.* may have an Action of Waſte, and the Writ ſhall ſay, *Ad exhæredationem Eccleſiæ*, for it is the Dowry of the Church. If a Tenant doth Waſte, and he in Reverſion dieth, the Heir ſhall not have an Action of Waſte, for Waſte done in the Life of his Anceſtor: For he cannot ſay that the Waſte was done to his Diſinheriſon; neither ſhall a Biſhop, Maſter of an Hoſpital, Parſon, *&c.* have an Action of Waſte done in the Time of their Predeceſſors.

5 Rep 67, 77. 1 Inſt. 54. a. 9. If a Leaſe is made to *A.* for Life, the Remainder to *B.* for Life, Remainder to *C.* in Fee; no Action of Waſte lieth againſt the firſt Leſſee during the Eſtate in the mean Remainder, for then his Eſtate would be deſtroyed. Otherwiſe if *B.* had a mean Remainder for Years, for that would be no Impediment, the Recovery not deſtroying the Term of Years.

1 Inſt 285. a. 283. a. 2 Inſt. 306. 5 Rep. 119. 2 Cro. 658. 10. If Leſſee for Years committeth Waſte, and the Years do expire, yet the Leſſor ſhall have an Action of Waſte for the treble Damages, though he cannot recover the Place waſted; but if the Leſſor accepteth of a Surrender of a Leaſe after the Waſte done, he ſhall not have his Action of Waſte. It is ſaid that if a Tenant repairs before Action brought, he in

Reverſion

Reverſion cannot have an Action of Waſte; but he cannot plead that he did no Waſte, therefore he muſt plead the ſpecial Matter.

11. Likewiſe, by 11 *H.* 6. *c.* 5. where Tenants for Life, or for another's Life, or for Years, grant over their Eſtates, and take the Profits to their own Uſe, and commit Waſte, they in Reverſion may have an Action of Waſte againſt them.

And ſo it is of mean Aſſignees; the Action lies againſt him that takes the Profits; but this is by the Statute of 11 *H.* 6. *c.* 5. For in that Caſe the Pernor of the Profits did not hold the Land. 2 Inſt. 302.

If *Tenant for Life or Years does Waſte, and grants over* his Eſtate, the Writ lies againſt him who did the Waſte, and not againſt the Grantee, F. N. B. 56. (A.)—But if the Waſte be done after the Alienation made, then it lies againſt the Tenant. F. N. B. 60. (L) but ſays, *tamen Quære.*

12. He in the Remainder as well as the Reverſioner may bring this Action, and every Aſſignee of the firſt Leſſee, mediate or immediate, is within this Act.

5 Rep. 77. Paget's Caſe. 2 Inſt. 302.

(H) Againſt whom the Action of Waſte may be brought.

1. IT has been ſaid, that there are five Writs of Waſte, two at the Common Law, as for Waſte done by Tenant in Dower, or by Guardian; three by Statute, as againſt Tenant for Life, Tenant for Years, and Tenant by the Curteſy. It has been ſaid however that Tenant by the Curteſy was puniſhable for Waſte by the Common Law, for that the Law created his Eſtate as well as that of the Tenant in Dower, and therefore the Law gives like Remedy againſt them. But on this Subject the Authorities in the Books are very contradictory, as the Reader will perceive by attending to the Note ſubjoined to the following Clauſe of——

1 Inſt. 54. a. 2 Inſt. 145, 299, 301, 305.

2. The *Statute of Glouceſter*, 6 *E.* 1. *cap.* 5. which enacts, That *a Man from henceforth ſhall have a* * *Writ of Waſte in the Chancery againſt* † *him that* ‡ *holds by Law of England.*

No Action of Waſte *lay before the Statute of* Glouceſter, *but againſt Tenant in Dower and Guardian*, and *by the Statute*, *Action* of Waſte is *given againſt Tenant by the Curteſy*, Tenant *for Term of Life*, and Tenant for Term of *Years*. Br. Waſte, pl. 68.——Lord *Coke* ſays, a Reaſon is required, (that ſeeing as well the Eſtate of the *Tenant by the Curteſy*, as the *Tenant in Dower* are created by Act in Law), wherefore the Prohibition of Waſte did not lie as well againſt the Tenant by Curteſy as the Tenant in Dower, at the Common Law; and the Reaſon he aſſigns is this, for that *by having Iſſue the State of the Tenant by the Curteſy is originally created*, and yet after that *he ſhall do Homage alone* in the Life of his Wife, which proves a larger Eſtate; and ſeeing that at the Creation of his Eſtate he might do Waſte, the Prohibition of Waſte lay not againſt him after his Wife's Deceaſe; but in the Caſe of Tenant in Dower, ſhe is puniſhable of Waſte at the firſt Creation of her Eſtate, 2 Inſt. 145.——But 2 Inſt. 299. ſay, that at the Common Law, Waſte was puniſhable in three Perſons, (*viz.*) Tenant in Dower, Tenant by the Curteſy, and the Guardian, but not againſt Tenant for Life, or Tenant for Years; and the Reaſon of the Diverſity was, for that the Law created their Eſtates and Intereſt; and therefore the Law gave Remedy againſt them, but Tenant for Life and for Years came in by Demiſe and Leaſe of the Owner of the Land, &c. and therefore he might in his Demiſe provide againſt the doing of Waſte by his Leſſee; and if he did not, it was his Negligence and Default.

* Neither this Act, nor the Statute of *Marlbridge*, doth create *new Kind of Waſtes*, but gives new Remedies for old Waſtes; and what is Waſte and what not, muſt be determined by the Common Law. 2 Inſt. 300, 301.

† If two are *Jointenants* for Years or for Life, and one of them does Waſte, this is the Waſte of them both as to the Place waſted, notwithſtanding the Words of the Act are, (him that holds.) 2 Inſt. 302.

‡ Here Tenant by the Curteſy is named for two Cauſes. *1ſt*, For that albeit the common Opinion was that an Action of Waſte did lie againſt him, yet ſome doubted of the ſame in Reſpect to this Word, *(tenet)* in the Writ, for that the Tenant by the Curteſy did not hold of the Heir, but of the Lord paramount; and after this Act, the Writ of Waſte grounded thereupon doth recite this Statute; *2dly*, For that greater Penalties were inflicted by this Act than were at the Common Law. 2 Inſt. 301.

* A Leſſee *for his own Life, or* for *another Man's Life*, is within the Words and Meaning of this Law, and in this Point this Act introduces that which was not at the Common Law. 2 Inſt. 301.

3. *Or* * *otherwiſe for Term of Life, or for Term of Years, or a Woman* † *in Dower.*

If *Feme Leſſee for Life takes Huſband*, the *Huſband does Waſte*, the *Wife dies*, the *Huſband ſhall not be puniſhed* by this Law; for the Words of this Act be (a Man that holds, *&c.* for Life) and the Huſband held not for Life; for he was ſeized but in Right of his Wife, and the Eſtate was in his Wife. 2 Inſt. 301.

He that hath an *Eſtate for Life by Conveyance at Common Law, or* by *Limitation of Uſe*, is a Tenant within the Statute. 2 Inſt. 302.

Tenants *for Years of a Moiety*, 3d or 4th Part, *pro indiviſo*, is within this Act; and ſo it is of a Tenant by the *Curteſy, or* other Tenant *for Life of a Moiety*, &c. 2 Inſt. 302.

† This is to be underſtood of all the five Kinds of Dowers whereof *Littleton* ſpeaks, *viz.* Dower *at Common Law*, Dower *by the Cuſtom*, Dower *ad Oſtium Eccleſiæ*, Dower *ex Aſſenſu Patris*, and Dower *de la Pluis beale*; and againſt all theſe the Action of Waſte did lie at the Common Law. 2 Inſt. 303.

If Tenant *in Dower* be *of* a *Manor*, and a *Copyholder* thereof *commits Waſte*, an Action of Waſte lies againſt Tenant in Dower. 2 *Inſt.* 303.

6 Rep. 37. b. Dean and Chapter of Worceſter.

4. Action of Waſte lies againſt an *Occupant for Life*, becauſe he has the Eſtate of the Leſſee for Life, and holds for Life, as the *Statute* mentions.

2 Roll. Abr. 826.

5. If *Leſſee for Life* be *attainted of Treaſon*, by which the Leaſe is forfeited to the *King*, who *grants it over to J. S. and he afterwards does Waſte*, though he comes in *en le Poſt*, yet Action of Waſte lies againſt him.

Br. Waſte, pl. 138.

6. So if a Man *diſſeiſes the Tenant for Life, and does Waſte*, yet Action of *Waſte lies againſt the Tenant for Term of Life*; for *he may have his Remedy over againſt the Diſſeiſor.*

1 Inſt. 54. a. (s)

7. Likewiſe, if an Eſtate be made *to* A. *and his Heirs, during the Life of* B. *A.* dies, *the Heir of* A. *ſhall be puniſhed* in an Action of Waſte.

6 Rep. 37. Dean and Chapter of Worceſter. F. N. B. 58. *(H)* and in the new

8. But an Action of Waſte does not lie againſt *Tenant by Statute Merchant, Elegit or Staple*, becauſe it is not an Eſtate for Life or Years, and the Statute mentions thoſe who hold in any manner for Life or Years. *Contra Fitzh. Na.* 58. *H.* and there ſaid, that in the Regiſter is a Writ againſt him.

Notes there *(a)* cites 21 E. 3. 26. that a *Scire facias* was brought againſt a Tenant *by Elegit*, who had cut Trees, *to pay the Reſidue of the Money to anſwer for the Trees cut*, and for the Plaintiff *to have his Land again*; *per Curiam.* By the Statute againſt cutting Trees this is in the Nature of a Treſpaſs, and lies not in Account, nor is he puniſhable in Waſte, but in an *Action on the Caſe.*—— Waſte lies not againſt Tenant by Elegit, but *Writ of Account.* Br. Waſte, pl. 78.

Fitzh. Na. 58. b. *(H)*. If ſuch Tenant cuts

9. Some Books give *the Reaſon of it to be*, becauſe the Conuſor, if he commits Waſte, may have a *Venire facias ad computandum*, and the Waſte ſhall be recovered in the Debt.

Timber *it ſinks the Debt*, and the Conuſor may have *Scire Facias ad computandum*, 3 Mod. 93 Arg. in the Caſe of the Mayor and Commonalty of Norwich *v.* Johnſon.

2 Inſt. 303.

10. If a Man makes a *Leaſe for Years*, and *puts out the Leſſee*, and *makes a Leaſe for Life*, and the *Leſſee for Years enters upon the Leſſee for Life, and does Waſte*, the Leſſee for Life ſhall not be puniſhed for it.

Brownl. 238. Anon.

11. If *Leſſee for Years* makes a *Leaſe of one Moiety to* A. and of the *other Moiety to* B. and *A.* does Waſte; the Action ſhall be againſt both; for the Waſte of the one is the Waſte of the other.

Br. Waſte, pl. 132.

12. An Action of Waſte lies againſt *a Deviſee*, and the Writ may ſuppoſe it *ex Legatione*, for it is within Equity of the *Statute.*

13. No Action of Waſte lies againſt *Guardian in Socage*, but an Account or Treſpaſs. 1 Inſt. 54. S. P. *contra* F. N. B. 59.

(E) and 2 Inſt. 135. ſays, the Heir within Age ſhall have an Action of Waſte againſt the Guardian in Socage.——But F. N. B. 59. (E) in the new Notes there, (d) it ſays, that *the Heir* in this Caſe ſhall have Account or Treſpaſs, but not Waſte.——And Ibid. (A) in the new Notes there (d) ſays, Note, Waſte does not lie againſt the Guardian in Socage, but only Account or Treſpaſs, according to the Nature of the Waſte, and ſays it was adjudged 16 E. 3.

If *Guardian in Socage in Right of his Wife* does Waſte, the Writ ſhall be againſt the Huſband only. Brownl. 239.

14. If an Eſtate of Lands be made to Baron and Feme, to hold to them during the Coverture, *&c.* if they waſte, the Feoffor ſhall have Writ of Waſte againſt them. Litt. S. 381.

15. If *Feme Leſſee for Life marries, and the Huſband does Waſte*, Action lies againſt both. 2 Roll. Abr. 827.

16. *And*, if in the above Caſe, the Huſband *dies*, Action of Waſte lies againſt the Feme for the Waſte he committed. Id. Ibid.

17. But if *Tenant in Dower marries, and the Huſband does Waſte and dies*, the Feme ſhall not be puniſhed for this. Id. Ibid.

18. Likewiſe, if *Baron and Feme are Leſſees for Life*, and *Baron does Waſte, and dies*, the Feme ſhall be puniſhed in Waſte, *if ſhe agrees to the Eſtate*. Id. Ibid. 1 Inſt. 54. Kelw. 113. pl. 42.

——Though there have been Variety of Opinions in our Books. She ſhall be puniſhed for the Waſte done by her Huſband in like Manner as if a Stranger had done it; and after the Death of her Huſband ſhe is in from the Leſſor. 2 Inſt. 303.

The Feme ſhall not be puniſhed for this Waſte; *per Hanke*. Br. Waſte, pl. 58. Br. Waſte, pl. 138. ſays, that Waſte does not lie againſt the Feme. But ſays, quære, If this be not the Waſte of both; and ſays, So ſee where there is Folly in the Feme, and where not. [Quære, If this does not mean by her agreeing to the Eſtate after the Baron's Death.]

19. *But if ſhe waives the Eſtate*, ſhe ſhall not be charged. 2 Roll. Abr. 827.

20. *So upon Leaſe for Years* made to the Baron and Feme, Waſte lies againſt both. And—— Id. Ibid.

21. If *Baron and Feme are Joint-leſſees for Years*, and *Baron does Waſte, and dies*, Action of Waſte lies for this againſt the Feme. Id. Ibid.

22. Upon Leaſe *for Life*, to Baron and Feme, Waſte lies againſt both. Id. Ibid.

23. Likewiſe, if *Feme commits Waſte and then marries*, the Action ſhall be brought againſt both. Id. Ibid. And the Writ may be *Quod fecerunt Vaſtum*, or *Quod Uxor, dum ſola fuit, fecit Vaſtum*. Br. Waſte, pl. 55.

24. If *Baron ſeized for Life of his Wife in Right of his Wife, does Waſte*, and after the *Feme dies*, no Action of Waſte lies againſt the Baron *in the Tenuit*, becauſe he was ſeized only in Right of his Wife, and the Franktenement was in the Feme. 1 Inſt. 54. 5 Rep. 75. b. reſolved *per tot. Cur.* *Clifton's* Caſe, that

the Writ does not lie; and the Reporter ſays, *Nota* Reader, This Judgment given upon Conſideration of the Statute of *Glouceſter*, and of Opinions *obiter in* 10 H. 6. 11 & 12. by *Strange* and *Cotteſmore*.——S. C. cited by *Treby* Ch. J. Lutw. 674. Baron *v.* Barkley; and ſaid the Reaſon is, becauſe it cannot be ſaid that the Baron *tenuit ex Dimiſſione*, according to the Words of the Statute.

25. *But if* Baron, *poſſeſſed for Years* in Right of the Feme, does Waſte, and after the Feme dies, Action of Waſte lies againſt the Baron, becauſe the Law gives the Term to him. 1 Inſt. 54.

26. *A.* made a *Feoffment* in Fee *to the Uſe of himſelf and his Wife*, and to *his Heirs*, there were *Underwoods* on the Lands, which were *uſually cut at* 21 *Years* Growth; *A. ſuffered them to grow* 25 *Years, and then died*; per tot. Cur. This ſhall bind the Wife; for where the Law limits a Time for Tenant for Life to fell Underwood, if it be not felled in that Time, it ſhall not be felled by a Tenant for Life afterwards, but it ſhall be Waſte. Godb. 4, 5. pl. 6. Anon.

27. *Leſſee*

Ow. 49. Anon. 27. *Leſſee for Years* of Lands *bought Trees with Liberty to cut them down within* 80 *Years.* Afterwards the *Leſſee bought the Inheritance, and deviſed to his Wife for Life*, Remainder *to the Plaintiff in Fee*, and *made his Wife Executrix*, and died; ſhe cut down the Trees; adjudged that an Action was maintainable; for though the Trees were once Chattels in the Leſſee, yet by purchaſing the Inheritance they are again united to the Land.

F. N. B. 59. (B) 28. If the King *commits the Wardſhip* of the Heir in Ward unto another, and the *Committee does Waſte*, then, upon a Surmiſe made thereof in Chancery, the King ſhall ſend a Writ unto the Eſcheator to go to the Land, and ſee if Waſte be done, and to certify the King thereof in the Chancery.

Id. Ibid. 29. If *Eſcheators* do commit Waſte in Lands which they have in their Hands in Cuſtody; the Heir within Age, or of full Age, ſhall have an Action of Waſte, and ſhall recover treble Damages againſt them, and they ſhall ſuffer Impriſonment two Years at the leaſt, at the King's Pleaſure. And ſo if Eſcheators do *commit Waſte in* other *Lands, ſeized into the King's Hands by Inqueſt of Office.*

Id. Ibid. 30. And Eſcheators, or other Guardians of Lands, *in the Vacation of the Temporalities of Biſhopricks*, ſhall do no Waſte, *&c.*

Hob. 36. pl. 51. Drury v. Kent. 31. Pending a *Quare impedit*, if the Incumbent cuts Trees upon the Glebe, and upon the Lands of Copyholders of a Manor, Parcel of the Rectory, a Prohibition lies.

Mo. 917. pl. 1303. Saccar's Caſe. 32. A Prohibition is awardable *againſt any one who waſtes the Houſes of the Parſon Incumbent, or cuts the Trees, or does any Waſte.* Agreed by all the Juſtices.

The *Prohibition of Waſte* was *abrogated, and the Action of Waſte framed* upon the Act of *Weſtm.* 2. (c. 14.) as in the Regiſter appears. 2. Inſt. 146.

2 Inſt. 302. 33. If Tenant by the Curteſy, or other *Tenant for Life, make a Leaſe for Years*, and he in the *Reverſion confirms it*, and Tenant by the Curteſy dies, an Action of Waſte lies againſt the Leſſee.

1 Inſt. 54. Le. 291. pl. 397. S. P. 2 Inſt 301. 34. But if Tenant by the Curteſy grants over his Eſtate, and Grantee commits Waſte, the Action of Waſte ought to be brought againſt the Tenant by the Curteſy by the Heir, and thereby he ſhall recover the Land againſt the Aſſignee: For the *Privity*, which is between the Heir and the Tenant by the Curteſy.

2 Roll. Abr. 818. 2 Inſt. 301.—S. P. 3 Rep. 23. b. in Walker's Caſe. 35. So if *Tenant in Dower grants over* her Eſtate, and after the Grantee commits Waſte, yet an Action of Waſte lies againſt the Tenant in Dower, for the *Privity* between them.

The Reaſon wherefore, at the Common Law, the Action of Waſte did lie againſt the Tenant in Dower, or Tenant by the Curteſy, albeit they had aſſigned over their Eſtates, was, *becauſe no Action of Waſte, by the Common Law, lay againſt the Aſſignee for Waſte done after the Aſſignment*; therefore the Action of Neceſſity did, for ſuch Waſte, (after the Aſſignment) lie againſt the Tenant by the Curteſy, or Tenant in Dower. 2 Inſt. 300.

And it lies againſt her, and not againſt the Grantee, for the Grantee cannot be Tenant in Dower; and *Confirmation by the Heir to the Tenant in Dower is no Bar in this Action*; becauſe it ſhall not change her Eſtate. Br. Waſte, pl 76.

Where the *Huſband levied a Fine, and took back an Eſtate for Life, Remainder to his Son in Tail, and died; and the Son endowed the Mother, who aſſigned over* the Eſtate. It was nevertheleſs adjudged, that Waſte laid againſt her as Tenant in Dower. F. N. B. 55. (E) in the new Notes there (a).

1 Inſt. 54.—S. P. 3 Rep. 23. b. in Walker's Caſe.—F. N. B. 56 (E) S. P. 36. *But* if Tenant by the Curteſy, or Tenant in Dower, grant over their Eſtate, and Grantee does Waſte, and the Heir, either before or after the Aſſignment, grant the Reverſion over, the Stranger *ſhall have* Action of *Waſte againſt the Aſſignee*, becauſe the Privity is deſtroyed.

For one cannot hold by the Curteſy, but of the Heir, *&c.*—He can hold of none but the Heir, and his Heirs by Deſcent. 1 Inſt. 316. a.—*But if Feoffee of the Baron endows the Feme*, and ſhe aſſigns over the Eſtate, Waſte lies for him againſt the Wife; for the Plaintiff ſhall not ſuppoſe in his Writ, that ſhe held in Dower of him *ex Aſſignatione*; but only that ſhe held in Dower of his Heritage. F. N. B. 56. (E) in the new Notes there (a).

37. If

37. If *Leſſee for Life grants grants over* his Eſtate *upon Condition*, and after the *Grantee commits Waſte*, and *Grantor enters for the Condition broken*, he cannot be charged for the Waſte committed by the Grantee. 1 Inſt. 54. The Action ſhall be brought againſt the Grantee. And ſo it is in Caſe of Tenant for Years. 2 Inſt. 302.—And the Place waſted ſhall be recovered. 1 Inſt. 54. a.

38. *So* if Leſſee for Life, *makes Feoffment upon Condition*, and Feoffee committs Waſte, and after Leſſee re-enters for the Condition broken, Action of Waſte does not lie againſt him for the Waſte committed by the Feoffee. 2 Roll. Abr. 828. contra 39 Aſſ. 15. by Tank.

39. If *Tenant for Life without Impeachment of Waſte leaſes for Years*, or otherwiſe, and Leſſee for Years commits Waſte, he in Remainder in Fee ſhall not have Action of Waſte; for this Leaſe was derived out of the privileged Eſtate for Life, and if Waſte lay, it ſhould be brought againſt the Tenant for Life, who made the Leaſe, and he was diſpuniſhable. Sir W. Jo. 51. pl. 2. Bray v. Tracy.

——But.

40. If there be *Leſſee for Life* Remainder *in Tail*, Remainder *in Fee to the Leſſee*, and he does Waſte, he in Remainder in Tail ſhall have Action of Waſte. 2 Roll. Abr. 828.

41. If Leſſee for Life and for Years, commits Waſte, and dies, his Executor ſhall not be charged for it. Id. Ibid. Contra 46 E. 3. 31. b. admitted. Br. Waſte, pl. 48.

42. But a *Condition in a Leaſe not to do Waſte, extends to the Aſſignee*, without naming him, and that as inherent to the Land. Clayt. Rep. 126, 127 pl. 125. Ward v. Waddington.

43. If Leſſee for 100 Years *grants Part of his Term to another*, and he commits Waſte, the Action ſhall be brought againſt the firſt Leſſee. Brownl. 238. Anon.

44. *Leſſee for Years* made a *Leaſe of one Moiety to A* and of the *other Moiety* to *B.*—*A.* does Waſte, the Action ſhall be againſt both; for the Waſte of the one is the Waſte of the other. Id. Ibid.

45. *B.* Leſſee for Years, the Reverſion to *A.* in Fee; *B.* aſſigned all his Term and Intereſt to *J. S* reſerving all Trees growing and being on the Lands, and afterwards he committed Waſte in cutting down the Trees; *A.* brought an Action againſt *J. S.* and it was diſputed whether the Action would lie. It ſeemed agreed, that if the Reſervation was good, then the Action would lie againſt the Aſſignee; but to prove it void, it was inſiſted, that what a Man cannot grant he cannot reſerve; ſo that becauſe the Leſſee cannot grant the Trees, he cannot reſerve them. As to the Point of Law the Court was divided. Goldſb. 63. pl 23. Forſter's Caſe. If *Tenant for Years or for Life aſſigns over* his Leaſe for Years, or Eſtate for Life, *excepting the Timber-Trees*, and after Waſte is done in felling down the Trees, the Action of Waſte is maintainable againſt the Aſſignee, for as to the Leſſor they are not ſevered from the Land. 2 Inſt. 302.

46. But Action of Waſte does not lie againſt *Tenant at Will*. Br. Waſte, pl. 52. who ſays, that Caſe lies, but not Waſte.——If *Tenant at Will* to him and his Heirs, *according to the Cuſtom, or another, Tenant at Will cuts Trees*, Action of *Waſte does not lie, but Treſpaſs*; *per* Aſcough Juſt. which was not denied by the other Juſtices, but it is not expreſſed whether he ſhall have Treſpaſs *Vi et Armis*. Br. Treſpaſs, pl. 147.—Tenant at Will cut down Trees, Leſſor brought Treſpaſs *Vi et Armis* againſt him, and held good, and Judgment accordingly. 4 Le. 167. pl. 271. Walgrave v. Somerſet.—becauſe otherwiſe he ſhall have no Action, for Waſte is not maintainable —1 Inſt. 57 a. It lies not againſt Tenant at Will *for permiſſive Waſte*, either *by Common Law or by Statute*. Arg. Show. 315. Cunlip v. Rundle.

47. Nor, according to ſome, againſt *Leſſee for a * Year*, though the Statute mentions Years. 2 Rol. Abr. 828. Contra 48 E. 3. 25.

It lies againſt Leſſee for a Year, and ſo from Year to Year. Br. Waſte, pl. 52.

* S. P. Or for half a Year. 2 Inſt. 302. And ſo tho' he holds only for twenty Weeks. Plow. C. 467.

1. Againſt

1. Againſt whom it may be brought for Waſte done by a Stranger.

48. If a Stranger commits Waſte, yet an Action of Waſte lies againſt the Leſſee, for in a Treſpaſs he ſhall recover his Damages againſt the Stranger.

49E.3.26.b. The Statute of Marlbridge prohibits Farmers doing Waſte, and yet if they ſuffer a Stranger to do Waſte they ſhall be charged with it; for it is preſumed in Law, that the Farmer may withſtand it, & *qui non obſtat quod obſtare poteſt facere videtur.* 2dly, The Law does give to every Man his proper Action, ſo as none be without due Remedy; and therefore in this Caſe, the Leſſor ſhall have his Action of Waſte againſt the Leſſee, and the Leſſee his Action of Treſpaſs againſt him that did the Waſte; and ſo the Loſs, as Reaſon requires, in the End ſhall be upon the Wrong-doer; and if the Leſſor ſhould not have his Action of Waſte he ſhould be without Remedy. 2 Inſt. 145, 146.

44E.3.27.b. 49. So if a Stranger diſſeiſes Leſſee and commits Waſte, Waſte lies againſt Leſſee for this, for he ſhall have his Remedy againſt the Stranger. And the Leſſor cannot in ſuch Caſe, have Treſpaſs againſt the Diſſeiſor. Br. Waſte, pl. 37. cites S. C.

46E.3.17.b. 50. If a Man, who has Common of Eſtovers of Land in Leaſe, does Waſte in cutting ſuch Wood as he ought not, Action of Waſte lies againſt Leſſee for it; for it ſeems he may have Treſpaſs againſt Commoner, for he is a meer Stranger for this.

F. N. B. 60. 51. A Guardian ſhall not be puniſhed in Waſte for Waſte done by a Stranger.

49E.3.26.b. 52. If Leſſee for Life leaſes for Years, and Leſſee for Years does Waſte, Waſte lies againſt Leſſee for Life.

1 Inſt. 54. a. 53. Tenant by the Curteſy and Tenant in Dower ſhall be puniſhed for Waſte done by a Stranger. For he in the Reverſion cannot have any Remedy but againſt the Tenant, and the Tenant ſhall have his Remedy againſt the Wrong doer, and recover all in Damages againſt him, for voluntary Waſte and permiſſive Waſte is all one to him that hath the Inheritance. But if the Waſte be done by the Enemies of the King, the Tenant ſhall not anſwer for the Waſte done by them, for the Tenant has no Remedy over againſt them. 2 Inſt. 303.

1 Inſt. 54. a. 2 Inſt. 305. cites 3 E. 3. 18. 54. If two are Jointenants of a Ward, and the one does Waſte, both ſhall be puniſhed in Action of Waſte. So of Waſte done by one, both ſhall be attainted for it. See 2 Inſt. 303.

1 Inſt. 54. a. 55. An Infant ſhall be puniſhed in Action of Waſte for Waſte done by a Stranger.

1 Inſt. 54 a. 56. Baron and Feme ſhall likewiſe be puniſhed in Waſte for Waſte done by a Stranger. If an Infant is Tenant by the Curteſy or Leſſee for Life or Years, he ſhall anſwer for the Waſte done by a Stranger, and have his Remedy over; though ſome have holden the contrary; and ſo it is in caſe of a Feme Covert, for the Privilege of Coverture and Infancy, in this Caſe, ſhall not prevail againſt the Wrong and Diſheriſon done to him that has the Inheritance, eſpecially when they have their Remedy over, and the Eſtate is of their own Purchaſe or Taking. 2 Inſt. 303.

1 Inſt. 54 a. 57. If Baron, poſſeſſed of a Leaſe for Years in Right of his Feme, commits Waſte, and after the Feme dies, Action of Waſte lies againſt the Baron, becauſe the Law gives the Term to the Baron.

2 Inſt. 303. cites as adjudged in 9 E. 3. 58. If Thieves burn the Houſe of Tenant for Life without any Default of Leſſee for Life in keeping his Fire, the Leſſee ſhall not be puniſhed for it in an Action of Waſte.

F. N. B. 60. 59. A Termor ſhall be puniſhed for Waſte done by a Stranger.

(G)

2. How

2. How far it lies againſt Executors, &c.

60. Waſte lies againſt *one Executor* alone, without naming his Companion, if the Waſte was done by him alone. 2 Inſt. 302.

61. If Termor does Waſte, and makes Executors, and dies, the Action of Waſte is loſt, for it does not lie againſt the Executors, but for Waſte done by themſelves, and not for the Waſte of the Teſtator: For it is as Treſpaſs, which is an Action perſonal, which dies with the Perſon. Br. Waſte, pl. 138. S. P. 2. Inſt. 302. It is the ſame in Caſe

of Adminiſtrators. Went. Off. of Exec. 127. But Brownl. 239. ſays, that an Action of Waſte lies againſt Executors for Waſte done by Teſtator.

62. Executor *de ſon tort* of a Term is chargeable in Waſte. 3 Lev. 35. Mayor, &c.

of Norwich *v.* Johnſon. S. C. 3 Mod. 90. it was objected in Error, that if the Plaintiff is intitled to this Action, it muſt be by the Statute of *Glouceſter*: But that it will not lie againſt the Defendant even by that Statute, becauſe the Action is thereby given againſt the Tenant by the Curteſy in Dower, for Life or Years, and treble Damages, &c. And that the Defendant is neither of theſe: And that it being ſo Penal a Law, ſhall be taken ſtrictly. But *per Cur.* This is a Remedial and yet a penal Law, and therefore ſhall have a favourable Conſtruction. And the Judgment was affirmed.

(I) At what Time an Action of Waſte may be brought.

1. WHEN the Reverſion is deveſted, the Leſſor cannot have an Action of Waſte, becauſe the Writ is, That the Leſſee did Waſte *ad exhæredationem* of the Leſſor, and that Inheritance muſt continue at the Time of the Action brought. 1 Inſt. 356. a.

2. If a Man brings Action of Waſte, and dies before any Recovery, his Heir ſhall not have Action for the ſame Waſte, becauſe the Damages do not belong to him, *contra* 20 *E.* 1. *Liber Parliamentarum*, 33. *b.* adjudged in Parliament upon Debate, and there commanded to the Juſtices henceforth to do accordingly in ſuch Caſe. Lord *Coke* ſays upon the Statute of *Glouceſter*, cap. 5. it has been received for

a certain Rule, That if Waſte be committed, and he in the Reverſion dies, that the Action of Waſte fails, for that the Heir cannot recover Damages for the Waſte in the Life of the Anceſtor, and the Waſte was not done to the Diſinheritance of the Heir; and yet the Law extends the Action of Waſte favourably, as much as with Convenience may be, leſt Waſte which is hurtful to the Commonwealth, ſhould remain unpuniſhed. 2 Inſt. 305.

3. If Leſſee for Years does Waſte, and after Leſſor enters upon him by *Tort*, he ſhall not have Action of Waſte againſt him during his own Seiſin, before re-entry by the Leſſee. Becauſe the Action ought to be in the *Tenet*. Br. Waſte, pl. 84. F. N. B. 60. *(L)* in the new Notes there (*b*) ſays, the Action is ſuſpended, and cites S. C.

4. If Leſſee for Life does Waſte, and after aliens in Fee, and Leſſor enters for Forfeiture, yet he ſhall have Action of Waſte againſt Leſſee; for peradventure if he had not entered he ſhould be diſinherited. 45 *E.* 3. 9. *b.*—14 *H.* 8. 14.—8 *H.* 6. 10. (It ſeems in thoſe Caſes he may have his Action in the *Tenet*; then it is clear that it lies). Br. Waſte, pl. 42. cites S. C. *per Finchden*, that the Reverſioner ſhall not

have Action of Waſte after his Entry for Waſte done before the Alienation. (In that Caſe the Action was brought in the *Tenuit.*)

5. If

5. If Tenant in Dower leaſes for her Life to him in Reverſion within Age, who never took the Profits, but at full Age diſagrees to the Leaſe; he may have Action of Waſte, for Waſte in the mean Time.

30 E. 3. 16. So if ſhe leaſes to the Heir within

Age, and a Stranger, rendering Rent on Condition of Re-entry for Non-payment of Rent. F. N. B. 55. (*E*) in the new Notes (*a*).

But if at the Time of, or during the Waſte done, the Heir takes any of the Profits, the Waſte is diſpuniſhable. F. N. B. 55. (*E*) in the new Notes (*a*).

1 Inſt. 53. b. 6. If after Waſte done, the Leſſor grants over the Reverſion in Fee, and retakes it, yet he ſhall not have Action for the ſaid Waſte.

Id. Ibid. 7. So if after the Waſte done, the Leſſor grants over the Reverſion, and retakes it to him and his Feme, and to his Heirs; yet he ſhall not have Action for the ſaid Waſte, becauſe the Eſtate, which was privy to the Waſte committed, is altered.

8. If *Leaſe* be made *for Life*, the *Remainder for Years*, Action of Waſte lies againſt Leſſee for Life, notwithſtanding the Remainder for Years; for *de minimis non curat lex*.

3 Roll. Abr. 829. 1 Inſt. 54. S. P. For

the Recovery therein ſhall deſtroy the Term for Years. 2 Inſt. 301.—F. N. B. 59. (*H*).

2 Roll. Abr. 829. 9. *But* if there be Leſſee *for Life*, *Remainder for Life*, Action of Waſte does not lie during the Continuance of the meſne Remainder.

But in ſuch

Caſe an *Injunction* has been granted out of Chancery. Mo. 554. pl. 748. Anon.

Br. Waſte, pl. 56. cites S. C. where *Perſay* held it did not lie; but *Belknap contra*. But *Broke* ſays, that the Law at this Day ſeems to be with *Perſay*.——For if he ſhould have Action againſt the firſt Leſſee, then the Eſtate of him in Remainder ſhall be deſtroyed; and ſuch Conſtruction muſt be made to preſerve the Eſtate of a Stranger, who is in no Fault; but if Remainder-man for Life dies, then the Waſte is puniſhable as well before as after his Death. 2 Inſt. 301.

1 Inſt. 54.— F. N. B. 58. (*C*) ſay that 10. So if there be Leſſee for *Life*, the *Remainder for Life*, the *Remainder in Fee to another*, he in Remainder ſhall not have Action of Waſte againſt the firſt Leſſee, during the Continuance of the Remainder for Life.

it lies not-

withſtanding; and at 59. (*H*) ſays it appears by the Regiſter, that the Writ is maintainable, though the mean Remainder for Life be between the Tenant for Life and him in Reverſion.——*So* if *Remainder-man for Life ſurrenders* his Eſtate to him in the Remainder or Reverſion in Fee. 5 Rep. 76. b. Paget's Caſe.——And F. N. B. 58. (*C*) in the new Notes (*b*) ſays, That Waſte does not lie till after the Death, or Surrender of the particular Eſtate. And 1 Inſt. 54. a. (*t*) ſays, That where it is ſaid in the Regiſter, and in F. N. B. that Waſte does lie, it is to be underſtood after the Death or Surrender of the mean Remainder.

But though he that has the Inheritance cannot have Action of Waſte, during the Life of the Remainder-man for Life; yet it was reſolved, That he may ſeize Timber-Trees cut down by the Tenant for Life; and alſo that a Trover and Converſion would lie for all of them, though he never ſeized Parcel of them; for by the cutting them down, an abſolute Property is veſted in the Plaintiff, unleſs they had been cut down for Reparations, and ſo employed in convenient Time. All. 81, 82, &c. Udall *v.* Udall.—And *Roll* was of Opinion, that an Action of Trover would lie for the Reverſioner againſt Tenant in Tail, after Poſſibility of Iſſue extinct; and he declared he was himſelf of that Opinion, becauſe he had only an Impunity if he committed Waſte, but no Intereſt in the Trees.—P. 10 Rep. 44. b. Jenning's Caſe.

2 Roll. Abr. 829. *Contra* 50 E. 3, 4. 11. *But* if there be Leſſee for Life, the Remainder for Life, *after the Death of the Remainder*, Action of Waſte lies againſt Leſſee *for Waſte committed during the Continuance of the Remainder*.

So where a *Leaſe* was made *for Years*, *Remainder for Life*, the *Remainder in Fee*; and Leſſee for Years does Waſte; and then the Leſſee for Life in Remainder dies. The Remainder in Fee ſhall have Waſte, for Waſte done during the mean Remainder for Life. Mo. 18. pl. 64. Anon.

2 Roll. Abr. 829. 1 Inſt. 299. b. S. P. Becauſe the 1. Likewiſe, if a *Feme*, *Leſſee for Life*, marries, and after *Leſſor confirms the Eſtate of the Baron* to have for his Life; by which the Baron has a Reverſion for Life; yet if Waſte be committed after, the Action lies againſt Baron and Feme, and this Reverſion is not any Impediment.

Baron him-

ſelf did the Waſte and the Wrong, and therefore ſhall not excuſe himſelf for doing the Waſte, in Reſpect that he himſelf has the Remainder.

13. If

13. If Leſſee *for Life, and for a Year after*, commits Waſte, Action of Waſte lies againſt him. 2 Roll. Abr. 829.

A Defendant pleaded that the Leaſe was *to him, his Heirs, and Aſſigns for Life, and a Year after*, and demanded Judgment of the Writ. But Thorp ſaid, That in this Caſe the Plaintiff could not have other Writ than what he had, and that Defendant might ſave his Eſtate by Proteſtation; and ſo he did, and pleaded *nul* Waſte done. Br. Waſte, pl. 101.

14. If a *Man leaſes for Life, and after grants the Reverſion for Years*, and after Leſſee for *Life commits Waſte*, no Action of Waſte lies againſt him during the Term for Years. 1 Inſt. 54. a. For he himſelf has granted away the Reverſion, in Reſpect whereof he is to maintain the Action. Id. ibid. and 273. a.

15. *But if* a Man leaſes *for Life or for Years, and after grants a Leaſe to commence after the* End of the firſt Eſtate, Action lies againſt the firſt Leſſee, notwithſtanding this future Intereſt: And the Term ſhall be ſaved in this Caſe. 1 Inſt. 54 a.

16. If there be a *Feoffee of Land upon Condition*, and *the Feoffor enters*, and *does Treſpaſs*, and afterwards the *Condition is broken*, and the *Feoffor enters*, yet the Feoffee ſhall have an Action of Treſpaſs againſt the Feoffor, notwithſtanding that he hath not the Land wherein the Treſpaſs was done. Perk. S. 97.

17. Where a *Leaſe* is made *to the Huſband and Wife* for Life or Years, there the Wife ſhall not be puniſhed after the Death of her Huſband for *Waſte done by the Huſband*. F. N. B. 59. (J)

18. If a Man leaſes *to* A. *during the Life of* B. the *Remainder to him during the Life of* C. if he commits Waſte, an Action of Waſte ſhall lie againſt him. 1 Inſt. 299 b. So if a Leaſe be made to *A.* for his Life, the Remainder to *A.* for the Life of *B.* if *A.* does Waſte, an Action of Waſte doth lie againſt him; for the Wrong-doer hath both the Eſtates in him; and of that Opinion was Sir James Dyer, Ch. J. 2 Inſt. 301.

19. But if there be a *Leaſe for Years* or Life, *Remainder to a Baron and Feme in ſpecial Tail, and Leſſee does Waſte*, and the *Feme dies without Iſſue*. The Baron ſhall not maintain any Action upon the Statute. Mo. 18. pl. 64. Anon. But Brown ſaid, That if the *Remainder* be limited over *to the Baron and his Heirs*, and the Feme dies after the Waſte done, the Baron (as he apprehends) ſhall have Action for this Waſte done in the Life of his Feme, becauſe the Eſtate of Tenant in Tail after Poſſibility is drowned in the Inheritance. But Dyer denied it. Id. ibid.

20. If Leſſor *covenants* with Leſſee *not to bring Action of Waſte during two Years* againſt him, and after, during the two Years, Leſſee does Waſte; Leſſor may, after the Expiration of the two Years, bring Action of Waſte for the Waſte done within the two Years; for the Covenant is *no Diſpenſation* as to the Waſte, as it was ſaid, but only with his Complaint during the two Years. Mo. 18. pl. 64. Anon. *But* otherwiſe it is where one makes a *Leaſe for two Years diſpuniſhable of Waſte*, for there he has diſpenſed with the Waſte, and not with the Action only. Id. Ibid. Anon.

21. If Leſſee for Life *without Impeachment of Waſte, and Reverſioner, join in a Leaſe for Years*; Leſſee is diſpuniſhable of Waſte during the Life of the Tenant for Life, but after his Death he is puniſhable; for, as *Dyer* and *Brown* ſaid, though at firſt it ſhould be ſaid to be the Leaſe of Tenant for Life, and the Confirmation of him in Reverſion, yet by ſuch Death it is altered into another Nature, and ſhall be ſaid the Leaſe of him in Reverſion. Mo. 72. pl. 196. Nudigate's Caſe.

22. *A.*

Sir W. Jo. 51. pl. 2. Bray v. Tracy. Cro. J. 688. pl. 4. S.C but that is only upon the Point of a

22. *A.* ſeized in Fee makes *Leaſe for Years*, and afterwards conveys the Reverſion to the *Uſe of himſelf for Life, without Impeachment of Waſte*, Remainder in Fee; Leſſee for Years commits Waſte; he ſhall not have the Privilege to be diſpuniſhed of Waſte; but after the Death of him in Reverſion for Life he ſhall be puniſhed.

Leaſe for Years to *A.* Remainder for Life without Impeachment of Waſte to *B.* Remainder in Tail to *C.* but ſaying nothing of the Conveyance ſubſequent to the Leaſe for Years. The Court held, that the Plaintiff ſhould recover; for though in the Life of *B.* the Termor by his Aſſent might have committed Waſte, and he had not been puniſhable afterwards, yet when he is dead he that committed the Waſte has done it to the Diſheriſon of him in Remainder, and it is all one as if it had been done after the Death of Tenant for Life.

Br. Waſte, pl. 76.

23. It was agreed, that the Heir ſhall not have Action of Waſte, in Time of his Father, but in his own Time, and Iſſue was taken accordingly.

(K) Of the Proceſs and Proceedings in Actions of Waſte.

If the Defendant be returned *Nihil, &c.* ſo a peradventure he was never ſummoned,

1. THE 13 *E.* 1. *c.* 14. Enacts, *That of all Manner of Waſte done to the Damage of any Perſon, there ſhall from henceforth be no Writ of Prohibition awarded, but a Writ of Summons, ſo that he of whom Complaint is, ſhall anſwer for Waſte done at any Time. And if he come not after the Summons, he ſhall be attached, and after the Attachment he ſhall be diſtrained.*

nor any other Writ ſerved whereby he might have Notice, yet a Writ of Enquiry of Waſte ſhall be awarded by this Branch of the Statute, for here it is not ſpecified, that Iſſues ſhould be returned, *&c.* but generally, and by the Writ, the Waſte ſhall be inquired of by the Oath of twelve Men, where the Defendant or any for him may attend if he will, and the Jurors may find againſt the Plaintiff. 2 Inſt. 389.

* If the Defendant appears upon the Diſtreſs, and pleads, and after makes Default, the Plaintiff ſhall not by this Branch have a Writ to inquire of the Waſte, becauſe it is out of the Words and Purview of this Act. 2 Inſt. 390.

2. *And if he come not after the Diſtreſs* *, *the Sheriff ſhall be commanded* † *that in proper Perſon he ſhall take with him twelve*, &c. *and ſhall go to the Place waſted.*

† Here are three Things to be obſerved, firſt, That the Sheriff ought to go in proper Perſon, for that though in *Rei Veritate* he is no Judge, yet this Writ is in Nature of a Commiſſion unto him, and he is in *Loco Judicis*, and therefore he ought to go *in propria Perſona*. Secondly, Where ſome have holden that the Sheriff may inquire upon this Writ, by Oath of ſix or eight Perſons, it appears that there ought not to be under twelve, for the Words of this Branch are *Aſſumptis ſecum* twelve. Yet this is but an Inqueſt of Office, for it is taken *ſans miſe des Parties*, that is, without any Iſſue joined. Thirdly, The Sheriff muſt go *ad Locum Vaſtatum* together with the Jurors, and view the ſame, for *iſta cadunt potius ſub Viſa quam ſub Auditu.* 2 Inſt. 390.

It was agreed by the whole Court, that if ſix of the Jury are examined upon a *Voire dire*, if they have ſeen the Place waſted that it is ſufficient, and the reſt of the Jury need not be examined upon a *Voire dire* but only to the Principal. Godb. 290. pl. 298. Gage *v.* Smith.

If the Waſte be aſſigned in divers Towns, the

3. *And ſhall inquire of the Waſte done, and ſhall return an Inqueſt, and after the Inqueſt returned they ſhall paſs unto Judgment, like as it is contained in the Statute of* Glouceſter.

Sheriff and the Jurors muſt view all the Places waſted in every of the Towns, but he may inquire thereof in any one of the Towns, and this Copulative doth ſo knit the Words together, as he cannot inquire in a foreign Town. 2 Inſt. 390.

Compl. Attorney, 251, 251, 250, 259.

4. The Proceſs incident to Action of Waſte, is, firſt a Writ of Summons made by the Curſitor of the County where the Land lies, and on the Return

turn of this Writ the Defendant may eſſoin, and the Plaintiff adjourn, &c. Then a *Pone* is to be made out by the Filizer of the County, on the Return of which, a *Diſtringas* Iſſues for the Defendant to appear; and upon his Appearance the Plaintiff declares, and the Defendant pleads, &c. Or if the Defendant makes Default, a Writ of Enquiry goes to the Sheriff, to inquire by the Oath of twelve Jurors, what Damage the Plaintiff hath ſuſtained, and then the Party hath Judgment to recover the treble of it: Alſo after Judgment entered, a Writ of Seiſin is awarded to the Sheriff to give Poſſeſſion to the Plaintiff of the Place waſted.

5. In Waſte againſt two, by the Biſhop, of *Exhæredationem Eccleſiæ*, and Proceſs continued till the grand Diſtreſs returned, one came and the other made Default, and he who appeared was compelled to anſwer alone, for the Proceſs is determined againſt the other. Br. Waſte, pl. 99.

6. In an Action of Waſte the Jurors ſhall have a View of the Place waſted, &c. as an Incident to the Action of Waſte, for in the Action at the Common Law, the Juror ſhould have had the View. Vin. Abr. V. 22 P. 491.

It was agreed by the whole Court, if the Jury be ſworn that they knew the Place, it is ſufficient, altho' they be not ſworn that they ſaw it; although that the Place waſted be ſhewn to the Jury by the Plaintiff's Servants, yet if it be by the Commandment of the Sheriff, it is as ſufficient as if the ſame had been ſhewed unto them by the Sheriff himſelf. Godb. 209. pl. 289. Gage *v.* Smith.

7. Though the View in Action of Waſte was not returned on the Proceſs on which the firſt Jurors appeared, and were ſworn, and tried the Iſſue, yet it was reſolved to be good enough, becauſe although the Jurors ought to have the View, yet it was not neceſſary for the Officer to return it; but the Court on the Trial ought to examine the Matter, whether the Jurors have had the View or not; for on the Trial ſix Jurors, at leaſt, ought to have had the View, or elſe the Jury ſhall not be taken. And a Day of Continuance was given *Eo quod* the Jurors had not the View, and *Interim videant*, &c. and in an Aſſize the View of the Jurors is requiſite, but it is never returned, for perhaps neither the Sheriff nor the Officer knows whether the Jurors have had the View or not; for the Words of the Writ are *Et Interim videant*, &c. and not *Et Interim haberi fac' Viſum:* So that the Jurors may view the Place waſted, when the Officer is not preſent, and therefore the Officer is not obliged to return the View; but it ought to be examined on the Trial, and the Party may make his Challenge to the Jurors for that Cauſe, if ſix of them at the leaſt have not had the View, and the Officer had returned that they had the View; yet if it appeared on the Trial, by Examination, that they had not the View, the Return would be to no Purpoſe, nor conclude any of the Parties, Plaintiff or Defendant. 2 Saund. 254. Green *v.* Cole.

8. 4 & 5 *Anne*, *cap.* 16. *ſ.* 8. Enacts, That in any Actions in any of her Majeſty's Courts at *Weſtminſter*, where it ſhall appear to the Court that it will be neceſſary that the Jurors ſhould have the View of the Place in queſtion, the Courts may order ſpecial Writs of *Diſtringas* or *Habeas Corpora*, by which the Sheriff or other Officer ſhall be commanded to have ſix out of the firſt twelve of the Jurors, or ſome greater Number, at the Place in queſtion, ſome convenient Time before the Trial, who ſhall have the Matters in queſtion ſhewn to them by two Perſons in the Writ named to be appointed by the Court.

9. In an Action of Waſte there ſhall be Summons and Severance for the Writ is *ad Exhæreditationem*, and the Action of Waſte is a Plea real. 2 Inſt. 307.

10. A Plaintiff ſhall have Coſts in all Actions of Waſte, where the Damages found do not exceed twenty Nobles, which he could not by the Common Law. Stat. 8 & 9 W. 3. c. 11.

11. Before any Waſte is done, a Prohibition may be had, directed to the Sheriff not to permit it; or he in Remainder, &c. may have an Injunction 2 Inſt. 146, 306. 11 Rep. 49. Lilford's Caſe.

tion out of the Chancery to ſtay the Waſte, and enter the Houſe or Lands, to ſee if Waſte is committed, &c.

Hobart's Rep. 112. Skeate v. Oxenbridge.

12. Though the *Eſtate* be *executed by the Statute of Uſes*, yet there may be *a general Writ and ſpecial Count.*

Id. Ibid.

13. If the *Writ mentions that* A. *being ſeiſed of the Land ſince* 27. H. 8. *infeoffed* B. *to Uſes*, &c and derives under it, though the Writ *does not mention that the Feoffment was to* B. *in Fee*, yet inaſmuch as the *Uſe had been to make the Writs ſo ever ſince the Statute*, it is to be allowed, though if it was not in Fee to *B.* but an Eſtate for Life of *B.* it will paſs. But the *Declaration* upon it *ought to alledge the Feoffment to be in Fee.*

Het. 79. Foſſam's Caſe.

14. A Man after the Statute of 27 *H.* 8. made a *Feoffment* in Fee *to the Uſe of himſelf for* Term of his *Life*, *and after* his Deceaſe *to the Uſe of* J. S. *and his Heirs.* The *Feoffee does Waſte*, and *J. S. brought his Action* of Waſte. And now if his Writ ſhall be general or ſpecial was demurred in Judgment. And *Hutton* and the other Juſtices were clearly of Opinion, that the *Plaintiff ought to have a ſpecial Writ*; and ſo it was adjudged afterwards

Theloal's Dig. lib. 11. c. 52. ſ. 7.

15. In Waſte *againſt Feme on a Leaſe made to herſelf for Life*, ſhe *pleaded that the Leaſe was made to her and her Baron for their two Lives*, *and that after the Baron's Death no Waſte was done*, *and ſo did not* plead to the Writ; but it was ſaid the Writ had been better if the Leaſe had been ſuppoſed to the Baron and Feme.

Br. Waſte, pl. 2.

16. In Waſte *by the Feoffees in Uſe againſt the Leſſee for Years of* Ceſtuy que Uſe, lies well, though no Form of Writ be thereof given in the Regiſter or in the Statute. But quære the Form of this Writ; for it was *cum W. & M. fuerunt ſeiſiti ad Uſum C.* and did not ſay of what Eſtate; and therefore held ill in this by ſeveral.

F. N. B. 56. (H).

17. In a Writ of Waſte, if the Premiſſes of the Writ recite *Quod non liceat alicui facere Vaſtum in Domibus*, *Boſcis*, *& Gardinis*, and in the End of the Writ it is ſaid that the Defendant *hath done Waſte in Lands*, Houſes, Woods, Gardens, *and Exile of Men*; ſo as there is *more in the End of the Writ than is in the Premiſſes*, yet the Writ is good; and *ſo if leſs* be in the End of the Writ than is recited in the Premiſſes, yet the Writ is good; as if it had been recited *Quod cum Proviſum ſit*, *quod non liceat alicui facere Vaſtum*, *&c. in Terris*, *Domibus*, *Boſcis*, *& Gardinis*; and in the End it is recited *Quod Defend' fecit Vaſtum in Terris* only, or *in Boſcis* only, or *in Domibus* only, yet the Writ is good.

Brownl. 238. Bedell v. Bedell.

18. If *Leaſe* be made to *Huſband and Wife for Life*, *and for twenty Years after their Deaths*, and the Wife dies and Waſte is committed, the Wife ſhall not be named in the Writ, nor the Term after her Death.

2 Inſt 305.

19. Note, that the Action of Waſte *againſt the Guardian* is general, *Fecit Vaſtum*, *&c. de Terris*, *&c. quas habet vel habuit in Cuſtodia de hæreditate prædict'*, which Writ doth extend as well to the Guardian *in Socage as in Chivalry.*

1. In

1. In what Caſes the Action ſhall be brought in the *Tenet*.

20. If Leſſee for *Life does Waſte, and grants his Eſtate*, yet Action of Waſte lies againſt him in the *Tenet*. 2 Roll. Abr. 829.

It ſhall be in the *Tenet* during the Term, becauſe in the Eye of the Law he is Tenant as to the Action of Waſte, and againſt him that was the Wrong-doer did the Action accrue, which he cannot avoid by his Aſſignment, and againſt him ſhall the treble Damage be recovered, and the Place veſted. And ſo it is of meſne Aſſignees; a juſt Interpretation, that he that did the Wrong ſhould anſwer the ſame; and this is the Cauſe that general Non-tenure is no Plea in an Action of Waſte, but ſpecial Non-tenure may be pleaded, as the granting over of his Eſtate, before which no Waſte was done. 2 Inſt. 302.

In Waſte it is no *Plea that the Defendant had nothing in the Land the Day of the Writ purchaſed*: For if *he does Waſte, and grants his Eſtate over*, yet Waſte lies againſt him; for the Grantee may ſay that no Waſte was done after the Grant made to him, and the other will incur no Miſchief if he has done no Waſte; for he may ſay, that ſuch a Day he granted over his Eſtate, before which Grant no Waſte was done; *per Finchden* clearly, and the Action of Waſte was *Quas Tenet*. And yet *Non-tenure is no Plea*; for by him Waſte is only Treſpaſs, and by recovering againſt him, the Grantee ſhall loſe the Place waſted; for the Plaintiff has elder Title than the Grantee. Br. Waſte, pl. 22.

In Waſte *Quas Tenet*; the *Defendant ſaid, that he had nothing the Day of the Writ purchaſed, nor ever after*, Judgment of the Writ, and held no Plea; for if a Man does Waſte, and grants his Eſtate over, the *Writ ſhall ſay, that they held as long as the Term continued*, and by this the Grantee who is no Party to the Writ, ſhall loſe the Place waſted. Br. Waſte, pl. 25.

21. If a *Guardian commits Waſte, and grants his Ward* over, the Ward ſhall have Waſte, during the Infancy in the *Tenet*, againſt the firſt Guardian for the ſaid Waſte. 2 Inſt. 305.

22. *And* if the Ward brings it againſt any *during his Nonage*, it ſhall be in the *Tenet*. Br. Waſte, pl. 33.

And yet if he was Guardian before the Writ purchaſed, he ſhall not be *charged* but to his own Time, and *every Guardian for his own Time*. Id. Ibid.

23. If a *Leaſe for Life* be made *upon Condition that if the Leſſee do ſuch an Act, his Eſtate ſhall ceaſe*, and he does commit ſuch an Act, the Writ ſhall be brought againſt the Leſſee in the *Tenet*, though his *Eſtate is ended*. Brownl. 239. Anon.

24. If *Feme Leſſee for Life grants his Eſtate* over, *and after marries*, the Action ſhall ſuppoſe that *Tenent*. 2 Roll. Abr. 829.

25. So if *Leſſee for Life does Waſte, and after aliens*, and Leſſor enters for the Forfeiture, the Writ ſhall be in the *Tenet*. 2 Roll. Abr. 830. Br. Waſte, pl. 84.

takes Notice only of Leſſee for Years, and which was the Principal Point of the Caſe, and that in ſuch Caſe the Writ ſhall be in the *Tenet*; but that in caſe of *Leſſee pur autre Vie where Ceſty que Vie dies*, it ſhall be in the *Tenuit*.

26. An Action was brought for Waſte *in Lands quas Tenet pro Termino Annorum*, and *counted that he leaſed to the Defendant*, 10 H. 7. *for Term of one Year, to commence at* Eaſter *next after, to continue for one Year, and ſo the next Year, and ſo from Year to Year as long as the Parties pleaſed, by Virtue of which Poſſeſſion*, &c. *he occupied by the Space of twenty-four Years, and aſſigned the Waſte certain*, &c. *The Defendant pleaded no Waſte* done, and *found for the Plaintiff*. And the Action was brought *Anno* 14 *A.* 8. And the *Court held that the Count abated the Writ; for where it is* Tenet, *and is thirty Years after the making, and counts of twenty-four Years*, this is a *Writ*, yet this Writ *quas Tenet* is good, *quod Cur conceſſit*. Br. Waſte, pl. 95. —— *But* where a Man *leaſes for Years and brings Writ quas Tenet* of the Waſte, &c. and the *Term expired pending the* Id. Ibid.

Determi-

Determination of the Leaſe a long Time before the Writ purchaſed, and therefore ſhall be *Tenuit*, and not *Tenet*.

2 Roll. Abr. 830. 27. If a *Leſſor bring Waſte*, the Writ ſhall be *quod fecit Vaſtum, &c. in Terris* which he holds of him.

Id. Ibid. 28. But if he in the Remainder brings Action of Waſte, the Writ ſhall not be, which he holds of him, becauſe he does not hold of him.

Id. Ibid. Br. Waſte, pl. 6. 29. So if ſuch Remainder eſcheats, and the Lord bring the Action of Waſte, the Writ ſhall not be, which he holds of him.

Mo. 72. pl. 196. in Nudigate's Caſe. 30. If the *Father Leaſes for Life and dies*, and afterwards *his Heir confirms the Eſtate* of the Leſſee for his Life, he ſhall have Action of Waſte, *quas Tenet* of his Demiſe; becauſe the firſt Leaſe is determined by the Confirmation; *per Dyer* and *Brown*.

Id. Ibid. 31. If there are two *Jointenants of Land limited to them and the Heirs of one*, and they *join in a Leaſe for Years*, and the *Tenant for Life dies*, the other ſhall have Action of Waſte of his Demiſe; *per Dyer* and *Brown*.

2. In what Caſes it ſhall be brought in the *Tenuit*.

2 Roll. Abr. 830. 32. There is not any Writ in Chancery in the *Tenuit* againſt Tenant for his own Life. But——

Id. Ibid. 33. It ſhall be brought in the *Tenuit againſt Leſſee for Years after the Term paſſed*.

Id. Ibid. 34. But if it be *not brought in the Tenuit*, yet *if there are any Words in the Writ which imply that it is paſt, it is good*, as *Quas ei dimiſit*.

Id. Ibid. Br. Waſte, pl 47. cites S. C. 35. *After the Death of* Ceſty que Vie *it ſhall be brought againſt the Tenant pur auter Vie* in the *Tenuit*.

And *per Perſey*, if Leaſe be made *to the Feme, and ſhe takes Baron, who does Waſte*, and the *Feme dies*, Waſte againſt the Baron ſhall be *quod Tenuit*.

† Br. Waſte, pl. 103. S. P. For he may hold over the Term.

2 Roll. Abr. 830. 36. If *Tenant pur auter Vie does Waſte, and aliens*, and Leſſor enters for the Forfeiture, the Writ ſhall be againſt him in the *Tenuit*.

Id. Ibid. 37. Likewiſe, if Waſte be *brought againſt a Guardian after full Age* of the Ward, the Writ ſhall be in the *Tenuit*.

Id. Ibid. 38. *So* it ſhall be in the *Tenuit*, if it be brought after full Age againſt a Guardian *for Waſte before Aſſignment over*.

Id. Ibid. 39. If *Feme Leſſee for Years does Waſte*, and the *Term incurs*, and *ſhe marries*, the Writ ſhall be againſt Baron and Feme, and ſhall ſuppoſe that they *tenuerunt*. (Quære this, for it ſeems it ſhall be the *Feme tenuit dum ſola fuit*.

Id. Ibid. 40. If *Feme Tenant pur auter Vie does Waſte*, and *Ceſty que Vie dies*, and *the Feme marries*, the Writ ſhall be that the Feme *tenuit*.

Br. Waſte, pl. 95. 41. If the *Leſſee makes a Feoffment, and the Leſſor re-enters*, the Action of Waſte ſhall be in the *Tenuit, becauſe the Leaſe is determined*. And *where he continues it, it ſhall be quas Tenet*. Note the Diverſity.

Id. Ibid. F. N. B. 60. (*L*) in the new Notes there (*b*) 42. So if Tenant does Waſte, and then *ſurrenders* to his Leſſor, the Writ ſhall be in the *Tenuit*, as ſome hold; but others hold it ſhould be in the *Tenet*, whether he be Tenant for Life or Years.

S. P. And if he in the Reverſion agrees thereunto, he ſhall not have an Action of Waſte in the *Tenuit*, for he cannot, by his own Act, alter the Form and Nature of his Action, from the *Tenet* to the *Tenuit*; and he cannot plead, That before ſuch a Surrender no Waſte was done. 2 Inſt. 304.

5 Rep. 12. b. Saunder's Caſe. 43. Likewiſe, if Grantee of a Term *upon Condition* does Waſte, and after the Grantor enters for Condition broken, Action of Waſte ſhall be maintainable againſt the Grantee in the *Tenuit*.

44. Where

44. Where *A.* was *Leſſee for Years* and *deviſed his Term to* B. *and made* C. *his Executor*, and died, and *C. did Waſte, and aſſented to the Deviſe.* In this Caſe, though between the Executor and Deviſee, this has Relation, and the Deviſee is in by the Deviſor, yet Action of *Waſte ſhall be maintainable againſt the Executors in the Tenuit.* 5 Rep. 12. b. Saunder's Caſe.

(L) Of the Pleadings in Action of Waſte.

1. IT is a good Plea in Waſte, that the Houſe was ruinous at the Time of the Demiſe, and therefore fell: Or that the Houſe or Trees fell by Wind or Tempeſt. Br. Waſte, pl. 130.

2. In Action of Waſte brought by the Leſſor againſt the Leſſee, the Leſſee in reſpect of Privity cannot plead *Riens en le Reverſion*; but he muſt ſhew how and by what Means the Reverſion is deveſted out of him; but if the Grantee of a Reverſion brings an Action of Waſte, the Leſſee may plead generally, that he has nothing in the Reverſion. 1 Inſt. 356. a.

3. In an Action of Waſte by the Heir againſt his Father, upon a Gift to the Father and Mother, and to the Heirs of the Mother; the Tenant ſaid, that he diſcontinued to *R.* in the Life of the Feme, *abſque hoc* that the Plaintiff had any Thing in the Reverſion, in the Right of his Wife the Day of the Writ purchaſed, or after, and the Plea was held double: And *per Martin* and others, Nothing in Reverſion only is a good Plea there. *Contra* where the Plaintiff counts of his own Leaſe, or of the Leaſe of his Anceſtor. But it is a good Plea in Waſte *ex Aſſignatione*, upon Grant of Reverſion to the Plaintiff. Note the Diverſity. Br. Waſte, pl. 85.

4. And in Waſte againſt Tenant by the Curteſy, it is a good Plea that he diſcontinued in Fee to *R.* in the Life of the Feme, and after *R.* leaſed to him for his Life, ſaving the Reverſion, and ſo nothing in Reverſion the Day of the Writ purchaſed, *&c.* Id. Ibid.

5. And where the Plaintiff counts of his own Leaſe, or of his Anceſtors, the Tenant may ſay *quod non dimiſit*, and ſhew how the Heir has granted the Reverſion to another to whom he attorned, after which Attornment no Waſte done. Id. Ibid.

6. In Waſte the Defendant ſaid as to the Grange, that the Moiety was decayed before the Leaſe, and the other Moiety was uncovered by Tempeſt; and before the Defendant could repair it, the Plaintiff entered, and was ſeized the Day of the Writ purchaſed. Judgment *ſi Actio*; and *per Hank*, the laſt Plea is double, the Tempeſt and the Entry; but *Hull contra.* Br. Waſte, pl. 69. for *per* Hull, the Entry is all the Matter, for the Tempeſt is not Waſte, unleſs the Defendant permits the Timber to rot after the Tempeſt. Br. Double Plea, pl 30.

7. Where a Leaſe is upon a Condition, that if the Tenant ſuffers Waſte, he may enter, there he cannot enter for uncovering by Tempeſt, unleſs he ſays that the Leſſee had ſufficient Time after to repair it, and did not. *Per Hull* clearly. Id. Ibid.

8. In Waſte for permitting a Houſe to be uncovered, by which the Timber became rotten and corrupt, Defendant ſaid, that the Day of the Writ purchaſed, the Houſe was ſufficiently repaired; and the beſt Opinion was, that it is no Plea; for it is in a Manner double, the one that if Waſte was done it is amended; and the other, that there never was Waſte. But if he had ſaid, that after the Waſte, it was ſufficiently repaired before the Writ purchaſed it ſeems to be a good Plea. Br. Waſte, pl. 86.

Br. Negative, &c. pl. 21.

9. Waſte in ten Aſhes, the Defendant ſaid, that the Plaintiff gave them to *R. C.* and commanded the Defendant to cut and deliver them to the ſaid *R. C* by which he did ſo. Judgment *ſi Actio*; the Plaintiff ſaid, that he did not cut by his Command; *per Newton* and *Paſton*, this is *Negative Pregnant*, by which he ſaid that he did not command him; *quod nota.*

Br. Waſte, pl. 89 Br. Bar. pl. 30. S C. And Brooke ſays, it ſeems to him, that if the Grant be by another Deed, it may well be pleaded in Bar alſo.

10. Where a Leaſe is by Deed without Impeachment of Waſte, or by Grant to be diſcharged of Waſte, all by one and the ſame Deed, the Tenant may rebut, and plead in Bar by it, and ſhall not be driven to his Writ of Covenant; *per Paſton. Brooke* makes a Quære, If he ſhall be driven to Writ of Covenant, if it be granted by another Deed.

2 Roll. Abr. 835.

11. If a Man leaſes Land to another *ſine Impedimento Vaſti*, it ſhall be a good Bar in an Action of Waſte; for thoſe Words (*ſine Impedimento Vaſti*) amount to as much as without Impeachment of Waſte.

Id. Ibid.

12. So if a Man leaſes the Manor of *D.* and all Lands and Tenements, *&c.* Parcel of the ſaid Manor, to have the aforeſaid Manor, Lands, Woods, *&c.* as Houſe-boot and Hay-boot, *ſine Impedimento Vaſti* for Years; this ſhall be a good Bar in Action of Waſte; for the Woods (*ſine Impedimento Vaſti*) relate to all the Things demiſed, and the expreſſing of Houſe-boot, *&c.* is Surplus and void.

Br. Waſte, pl. 89.

13. Where the Defendant juſtifies the Waſte of cutting of Aſhes for Fire-boot, he ought to ſurmiſe, that there were no Underwoods upon the Land, *&c.* And the ſame Law ſeems to be where he takes Beeches or other Trees which are Timber, by the beſt Opinion of the Court.

44 E. 3. 44. b. For the carrying them away by the Leſſor is no Excuſe of the Waſte, which the Leſſee was guilty of by the Abatement. Br. Waſte, pl. 39. cites S. C.

14. If Leſſee does Waſte by cutting of Trees, and Leſſor carries them away (admitting the carrying away tortious, for there it is held, that he may have Treſpaſs for them againſt the Leſſor) yet this is not any Matter in Bar of the Action; but he ſhall be put to his Treſpaſs.

Br. Waſte, pl. 112. In Waſte for Trees cut and ſold, the Defendant muſt anſwer to both: For the Sale is traverſable, and admit that he cuts and ſells and buys them again, and beſtows them upon the Repairs of the Houſe, yet the Tort which is ſuppoſed in the Sale is not anſwered; *per* Montague. And Knightly ſeemed to be of the ſame Opinion; and he ought alſo to conclude, that it is the ſame Waſte. D. 35. b. 36. a. pl. 33, 34. in Caſe of Malverer *v.* Spink. D. 90. b. pl. 8. in Caſe of Mervin *v.* Lyds.

15. Waſte in a Houſe, and alſo in a Wood, by which he cut the Trees and ſold them, *&c.* The Defendant as to the Houſe ſaid, that no Waſte was done; and to the Trees, that the Houſe was ruinous in Groundſels at the Time of the Demiſe, by which he cut for Reparations, and put the Trees in the Groundſels; and *per Cur.* This is a good Plea: Where the Plaintiff counts generally of cutting of Trees without more, but *contra* where he counts of Sale, as here; for there he ſhall anſwer to the Sale, by which *Cateſby* juſtified as above, *abſque hoc*, that he ſold them, and good Reaſon, for the Writ of Waſte is, *Quod non liceat alicui Vaſtum, Venditionem ſeu Deſtructionem facere in Terris, Domibus, Boſcis, &c.*

Br. Waſte, pl. 112. per Choke J.

16. *Ne venda pas* is no Plea, but Defendant ſhall juſtify as in the Plea above, *abſque hoc*, that he ſold; or ſhall ſay, no Waſte done generally.

Br. Waſte, pl. 114.

17. In Treſpaſs it was agreed, that Tenant for Years may cut Wood, but it was doubted of Tenant at Will; but it ſeems that as long as Tenant at Will is not countermanded, he may cut ſeaſonable Wood, *&c.* *Littleton* ſaid, then he ought to ſay, they have uſed ſuch Cuſtom in the Country to cut Underwood, for otherwiſe the Juſtification is not good. *Queræ inde.*

18. Note,

18. Note, Where Hedge-boot or Pale-boot are granted to be taken reaſonably, and where certain Loads or a certain Number of Trees are granted annually for that Purpoſe, here it is not neceſſary to ſhew that the Fence is in Decay; and note that for Fire-boot it is not neceſſary at the Time of cutting to ſhew the Neceſſity; ſo for Reparation, for it is Reaſon and good Huſbandry to cut them in ſome convenient Time before-hand; becauſe that which is allowed certainly at ſome Years may not be ſufficient. Noy 23. Jenkins v. Jenkins. 17 E. 3. 7.

19. If a Man leaſes a Houſe, and grants farther to Leſſee, that he may make his beſt Profit of it; this Grant ſhall not be any Bar in Action of Waſte for abating of the Houſe; for the Grant ſhall be intended, that he ſhall make his beſt Profit according to the Law, without Tort and Diſinheritance to the Leſſor. *Dubitatur.* S. C. cited Arg. Lat. 137. in the Caſe of Daniel v. Upley.

20. So if the Leaſe be of a Wood, with Grant to make his beſt Profit of it, he cannot cut and ſell. *Dubitatur.* 17 E. 3. 7. b.

21. But if a Man leaſes Land, and grants farther to the Leſſee, that he ſhall make his beſt Profit of the Mines of Stones, Coal, and Iron, open in the Land; this Grant ſhall be a good Bar in an Action of Waſte for digging of Coals, Stone, and Iron, and ſelling: For the moſt Profit of them is to ſell, and he can have little other Profit. 17 E. 3. 7. b. Leſſee for Years of Mineral Lands, with Liberty to dig, and make his Profit of the Mines, digged for Mine, and ſold the Gravel coming off it; this is no Waſte, if the firſt Act of digging be not Waſte: For the Sale is not Waſte, that being a ſubſequent Act. Adjudged Godb. 28. pl. 37. 27 E. C. B. Anon.

22. In Waſte by him in Remainder, he ought to ſhew the Deed of Remainder. Br. Waſte, pl. 28. He ſhall ſhew the Deed, if it be demanded by the Tenant. But *per Finch*, he need not ſhew it till then. Br. Monſtrans, pl. 15.

23. In Waſte againſt Tenant for Years of the Leaſe of the Plaintiff himſelf, the Defendant pleaded that the Plaintiff *Nil habuit in Tenementis* but jointly with his Wife in Tail, *&c.* and held a good Plea. Theloal's Dig. lib. 11. cap. 44.

24. So in Waſte againſt Baron and Feme, on a Leaſe to them both made by the Plaintiff's Father, the Tenants pleaded, that the Plaintiff's Father *ne leſſa pas* to them, *Modo & Forma*, *&c.* and held a good Plea. Theloal's Dig. lib. 11. cap. 52. S. 25.

25. But in Waſte againſt Tenant in Dower, ſhe pleaded a Grant made to her by the Heir, to hold without Impeachment of Waſte, and averted that he had Aſſets by Deſcent; and the Opinion was, that it is no Plea: For the Statute of *Glouceſter* ſpeaks of Warranty with Aſſets to bar the Tail, and not of Grant with Aſſets. Br. Waſte, pl. 76.

26. In Action of Waſte againſt Tenant in Dower, it is a good Bar, that the Baron who was the Anceſtor of the Plaintiff, aliened to *B.* who aſſigned to her her Dower, and ſo the Reverſion is in him, and not in the Plaintiff. 39 E. 3. 33.

27. In Waſte againſt Tenant by the Curteſy, or in Dower, they may ſay, that the Plaintiff granted the Reverſion to *M. N.* to whom they attorned. Br. Releaſe, pl. 46. If the Heir granted away the Reverſion, and Tenant attorned, the Action failed at Common Law. 2 Inſt. 300.

28. In Waſte, the Plaintiff counted upon a Leaſe for Years, by him made to the Defendant, and that he did Waſte: And the Defendant was not ſuffered to ſay, that he did not leaſe for Term of Years, but that he did not leaſe *Modo & Forma*, *&c.* for if he leaſes for Life or in Fee, the Defendant may plead it, and traverſe the Count, *&c.* Br. Negativa, &c. pl 7.

29. In Waſte againſt *A.* for Tenements, which he held of the Leaſe of *E.* who held them for Term of Life of the Leaſe of his Father; the Defendant ſaid, that he had * nothing in the Tenements the Day of the Writ purchaſed, nor ever after; but *E.* was and is Tenant: Judgment of the Writ and *non allocatur*, upon which he ſaid, that *E.* was Tenant, the Day of the Writ purchaſed, *abſque hoc*, that he ever any Thing had of the Leaſe? Br. Waſte, pl. 35. Br. Nontenure, pl. 55. * Br. Nontenure, pl. 7.

Leaſe of *E.* which was held a good Plea, and the other maintained his Writ; *quod nota*, and yet *Nontenure* is no Plea in Waſte; but it ſeems that this amounts to that *E. non dimiſit Modo & Forma.*

Br. Waſte, pl. 108. The Leſſor was ſeiſed in Fee, but in his Leaſe did not except the Gravel, and ſo his Command, during the Leaſe, is not good: and, by *Townſhend*, this Gravel is Part of the Inheritance, and he cannot grant his Inheritance, by Parol only without Deed. See the *Year-Book*, 2 *H.* 7. 14.

30. Waſte was brought againſt Tenant for Life for digging Clay and Gravel, the Defendant juſtified, by Command of the Plaintiff; and the beſt Opinion was, that it is no Plea, for the Leſſor himſelf cannot juſtify to dig it, therefore his Command is void; as if I command *J. S.* to kill my Father, which he does, I ſhall have Appeal: And in Formedon if Writ of Eſtrepement is delivered to the Tenant, the Demandant cannot command him to cut the Trees, but Eſtrepement lies, for thoſe Commands are void.

Mo. 54. pl. 158. Ward and Uxor *v.* Dettenſam.

31. But where *W.* brought Waſte againſt the Defendant, Tenant for Life, by Reaſon of a Remainder to him limited by Uſe; and aſſigned the Waſte *Proſternendo Horreum.* The Defendant pleaded in Bar, that the great Timber of the ſaid Barn, at the Time of the Death of her Huſband, was ſo rotten, *&c.* that it could not be repaired. This was taken to be a good Plea, and Iſſue taken upon the Matter.

3 Le. 203. pl. 256. Thorp *v.* Wingfield.

32. The Plaintiff made a Leaſe for Years to *A.* and before the Expiration thereof he made another Leaſe of the ſame Lands to *B.* the Defendant, to begin preſently, and then brought Action of Waſte againſt him for Waſte done during the firſt Leaſe: The Court ſaid, that in ſuch Caſe it would not be ſafe for him to plead, No *Waſte done*, for it would be found againſt him, and if he ſhould plead the ſpecial Matter, as aforeſaid, *viz.* That the firſt Leaſe was in being at the Time of the Waſte done, after the Expiration whereof no Waſte was done: This would be good, if the ſecond Leaſe was not by Indenture, otherwiſe he will be eſtopped by the Indenture from ſhewing that the ſecond Leaſe had another Beginning than the Indenture purports, and then the Waſte will charge him. And if Defendant pleads the ſpecial Matter, the Plaintiff, by his Replication, may eſtop him to plead any other Beginning of the Term than the Letter of the Indenture purports, and it will be no Departure becauſe it ſtrengthens the Declaration.

Ow. 24. C. B. Owen's Caſe.

33. Ancient Demeſne is no good Plea in an Action upon the Statute of *Glouceſter*, for it is only a perſonal Action, and the Statute is beneficial to the Commonwealth.

Cro. Eliz. 593. pl. 33. C. B. George *v.* Stamfield.

34. Waſte for cutting down 300 Oaks; the Defendant pleaded as to 200 of them, that the Houſe leaſed was ruinous, *&c.* and that he cut them down to repair the Houſes, and as to the Reſidue, that he felled and keeps them to employ about the Reparations *Tempore opportuno.* And all the Court, without Argument, held it no Plea: For if it ſhould be good, every Farmer might cut down all the Trees on his Farm, when there was no Manner of Occaſion to repair.

1 Inſt. 355 b. If the Action by two be brought in the *Tenuit*, a Releaſe of the one is a Bar to both. But otherwiſe it is in the *Tenet*, for there the Releaſe of one doth not bar the other. Id. Ibid.

35. If two bring an Action of Waſte, the Releaſe of one is a good Bar againſt the other.

Br. Waſte, pl. 145. But if Tenant in Fee releaſes to his Tenant for Life all his Right, yet he ſhall have Action of Waſte.——So if Leſſee for Life does Waſte, and grants over his Eſtate, and Leſſor releaſes to the Grantee; in an Action of Waſte againſt the Leſſee, he ſhall plead the Releaſe: And yet he has nothing in the Land. 1 Inſt. 269. b. ——And ſo in Waſte ſhall Tenant in Dower, or by the Curteſy, in the like Caſe, and the Vouchee and the Tenant in a *Præcipe*, after a Feoffment made, and ſo in a *Contra Formam Collationis.* Id. Ibid.

36. If there be Tenant for Life, the Remainder over in Tail, and he in Remainder releaſes to the Tenant all his Right, this is a good Bar againſt Releaſor in a Writ of Waſte; and yet Fee nor Fee Tail does not paſs.

(M) Of the Judgment in Actions of Waſte, and what ſhall be recovered thereby.

1. STATUTE of *Glouceſter*, 6 *E.* 1. *c.* 5. Enacts, *That he* † *which ſhall be attainted of Waſte, ſhall leeſe* * *the Thing that he hath waſted: And moreover ſhall* ‡ *recompence thrice ſo much as the Waſte ſhall be taxed at.*

† If one Joint-tenant does the Waſte, both ſhall be attainted of that did the Waſte only. 2 Inſt. 302.

the Waſte, &c. 2 Inſt. 303.——But treble Damages ſhall be recovered againſt him

* In an Action of Waſte againſt a Leſſee for Life, for Waſte done in three Acres, the Defendant claims Fee: Whereupon Iſſue is joined, the Jury find againſt the Defendant, That he hath but an Eſtate for Life: And inquired further of the Waſte, and found the Waſte done in one Acre only. The Plaintiff cannot have Judgment for the whole Land, in Reſpect of the Forfeiture and treble Damages; For that Judgment is not according to this Act, that is to ſay, of the Place waſted, and treble Damages in Reſpect of the Place waſted: Wherefore he had Judgment according to the Statute, of one Acre and treble Damages. 2 Inſt. 305.

‡ Whereſoever the Common Law gave ſingle Damages againſt any, this Act gives treble, unleſs there be any ſpecial Proviſion made by this Act. 2 Inſt. 306.

This Statute does not bind the King. *Per* Coke Arg. Mo. 321. in Engleſield's Caſe.

2. *And for Waſte made in the Time of Wardſhip, it ſhall be done as is contained in the Great Charter.*

If the Guardian ſuffers a Stranger to cut down Timber-Trees, or to proſtrate any of the Houſes, and according to his Name of Guardian doth not endeavour to keep and preſerve the Inheritance of the Ward in his Cuſtody and Keeping, nor to forbid and withſtand the Wrong-doer, this ſhall be taken in Law for his Conſent: For in this Caſe *qui non prohibet quod prohibere poteſt aſſentire videtur*; and if ſuch Waſte and Deſtruction be done without the Knowledge of the Guardian, or with ſuch Number as he could not withſtand, then ought the Guardian to cauſe an Aſſiſe to be brought againſt ſuch Wrong-doers, by the Heir, wherein he ſhall recover the Freehold and the Damages for ſuch Wrong and Diſheriſon. So note a Diverſity between the Intereſt of a Guardian created by Law: For there in an Aſſiſe the Heir ſhall recover Damages; but otherwiſe it is in Caſe of a Leaſe for Years, which is the Leſſor's own Act. 2 Inſt. 305.

3. *And where it is contained in the Great Charter, that he which did Waſte during the Cuſtody ſhall leeſe the Wardſhip; it is agreed that he ſhall recompence the Heir his Damages for the Waſte, if ſo be that the Wardſhip loſt do not amount to the Value of the Damages, before the Age of the Heir of the ſame Wardſhip.*

The Committee of a Ward did Waſte, and after tendered Marriage to the Heir, and he refuſed, and married elſewhere. The Waſte is found by Office. The Queſtion was, Whether the Committee may bring Forfeiture of Marriage. The Court upon Adviſement held, That the Committee by doing Waſte loſt only the Ward of the Land, and not of the Body, by the expreſs Words of this Statute. Dy. 25. b. pl. 163. Anon.

4. Upon the Conſtruction of the Statute of *Glouceſter*, ſome Queſtion has been made, whether in this mixed Action the Place waſted is the principal or the Damages: And in divers Reſpects the one is more principal than the other: For in Reſpect of the Antiquity againſt Tenant in Dower, and Tenant by the Curteſy, the Damages are the Principal; and therefore they ſhall be ſometimes preferred, *viz.* The Plaintiff to have Execution of the Damages before the Place waſted, but in Reſpect of the Quality, the Realty is ever preferred before the Perſonalty, and therefore in Waſte, if the Defendant confeſs the Action, the Plaintiff may have Judgment of the Land, and releaſe his Damages, which proves the Realty to be the Principal; for *omne majus dignum trahit ad ſe minus.* 2 Inſt. 307.

5. If two Coparceners leaſe Land for Life, and after Waſte committed one dies; the Aunt and Niece muſt join in Action: And though the Niece ſhall recover no Damages, yet ſhe ſhall recover the Place waſted: And it ſeems they ſhall hold the ſame in Coparcenary. F. N. B. 60. (R)

6. In

Br. Waſte, pl. 24. If a Termor of a Wood does Waſte in one

6. In Waſte at the *Niſi Prius* Waſte was found in four Oaks in divers Parts in a Wood: And it was doubted if he ſhall recover the Wood or the Place waſted: And at laſt it was awarded, that he recover the Place waſted, and his treble Damages.

Corner of the Wood, he ſhall not loſe all the Wood, *per Fineux*, Ch. J. but only the Place waſted. Br. Waſte, pl. 96 ——But if there are divers Plots of the Land in the Wood in divers Places; if the Termor does Waſte in the Wood, he ſhall loſe thoſe Plots, tho' he did not do Waſte in them; for thoſe are Parcel of the Wood: And this ſeems to be where he has done Waſte in the Wood *ſparſim & circumquaque*; and this was ſaid by *Fineux* in the Reading of *Thecher*. Ibid.

1 Inſt. 54. a. Browni. 240. S. P. Anon. and the treble Value ſhall be levied by *Fi. fa.* &c.

7. If Trees growing *ſparſim* in a Cloſe are cut, in an Action of Waſte all the Cloſe ſhall be recovered. Id. Ibid.

2 Inſt. 54.

8. If Waſte be done in divers Rooms in a Houſe, the Rooms ſhall be recovered in Action of Waſte, and not all the Houſe.

Id. Ibid.

9. But if Waſte be done in a Houſe *ſparſim* throughout the Houſe, all the Houſe ſhall be recovered.

Id. Ibid. In antient Time, it was holden by

10. If Waſte be done in the Hall of the Houſe, yet all the Houſe ſhall not be recovered, tho' ſome ſay, that the Houſe has its Denomination from the Hall.

ſome, that if the Hall was waſted, the whole Houſe ſhould be recovered; for that in thoſe Days the Hall was the Place of the greateſt Reſort and Uſe, inſomuch, that the whole Houſe was called by the Name of the Hall, as *Dale Hall*, &c. but the Purview of the Statute of *Glouceſter* is, that he ſhall loſe that Thing that he hath waſted. 2 Inſt. 303, 304.

Noy Attorney-General, in Mr. *Atkins*'s Reading held, that the 15 E. 3. Tit. Waſte, 8. That in Waſte of the Hall the Houſe ſhall be recovered, was good Law, contrary to the Opinion of 1 Inſt. 54. a. And he cited the Caſe of Lord Abergavenny *v.* Sir Richard Southwell, in an Action of Waſte, for Waſte done in Kitchen and Larder of a Caſtle, and all the Caſtle was recovered, becauſe a Caſtle is not dividable, and ſo adjudged. 11 Eliz. See D. 272. b. Marg. pl. 33.

2 Roll. Abr. 836.

11. If a Man brings an Action of Waſte, becauſe the Pales of a Park, which incompaſs the Park, were permitted to decay; but it is not averred that there were any Deer in the Park, or that thereby the Deer were diſperſed, and in this Action the Plaintiff recovers; he ſhall not recover all the Land which is compriſed within the Pale, but only the Place where the Pale ſtood. And the Court ſeemed to incline to it in Writ of Error upon ſuch Judgment in Bank, the Judgment being affirmed in the King's Bench to recover the Place waſted.

Br. Waſte, pl. 33.

12. If a Man does Waſte, and grants his Eſtate over, yet upon Action brought againſt him, he ſhall loſe the Place waſted: And his Grantee, who is not Party to it, ſhall loſe his Intereſt. And therefore it is a good Plea for the Grantee, that ſuch a Day he granted his Eſtate over, before which Grant no Waſte was done: And in Action againſt the Grantee it is a good Plea, that *J. N.* granted it to him, after which Grant no Waſte was done.

Br. Waſte, pl. 116.

13. In Waſte by two upon a Leaſe for Term of Life, one was ſummoned and ſevered, and the other ſued forth, and aſſigned the Waſte in divers Things, as in cutting of Willows, and found for the Plaintiff, and Damages were taxed, and he had Judgment to recover the Moiety of the Damages, and the Moiety of the Place waſted, and as to the Willows the Court adviſed.

Br. Waſte, pl. 136.

14. If a Man does Waſte in Hedge-rows which ſurround a Paſture, nothing ſhall be recovered but the Place waſted, *viz.* the Circuit of the Root and not the intire Paſture.

Vin. Abr. V. 22, 509.

15. If the Tenant of one Houſe is Diſſeiſor of the next Houſe, and he pulls down both, and builds them into one new one, Diſſeiſee ſhall recover all the Houſe.

16. When

16. When Waſte is brought in the *Tenuit*, Damages are only to be recovered. 6 Rep. 44. Blake's Caſe.

17. If Leſſee for Years or Life grants a Rent out of the Land ſo leaſed, and afterwards commits Waſte, if the Lord recovers the Place waſted, yet the Land ſhall be charged. Brownl. 238. Anon.

(N) In what Caſes in general Waſte may be reſtrained by Injunction in Equity.

1. IF a Tenant for Life plant Woad on the Land, which is of ſo poiſonous a Quality that it deſtroys the Principles of Vegetation, without an expreſs Power in his Leaſe, where it is uſual to have ſuch Powers, it may be conſidered as Waſte, and the Court of Chancery may grant an Injunction. MS Rep. Marquis of Powis v. Dorall, Canc.

2. If there be Leſſee for Life, Remainder for Life, the Reverſion or Remainder in Fee, and the Leſſee in Poſſeſſion Waſtes the Lands, though he is not puniſhable for Waſte by the * Common Law, by Reaſon of the mean Remainder for Life; yet he ſhall be reſtrained in Chancery, for this is a particular Miſchief. Moor 554. S. P. 1 Vern. 23. S. P.

* That ſuch Leſſee is not puniſhable by the Common Law, during the Continuance of the Remainder, though after its Determination he is. *Vide* 1 Inſt. 54. 2 Inſt. 301.

3. But if ſuch Leſſee has in his Leaſe an expreſs Clauſe of *without Impeachment of Waſte*, he ſhall not be enjoined in Equity. 1 Vern 23. Although a Court of Equity will not aſſiſt a Forfeiture, yet the Tenant in Poſſeſſion ſhall be reſtrained in Equity from committing Waſte in all Caſes, in which Waſte is puniſhable by Law; and for this Purpoſe an Injunction will be granted before the Bill is filed; alſo an Injunction will be granted to ſtay Waſte in Behalf of an Infant *in Ventre ſa Mere*; Equity will likewiſe, (in ſome particular Caſes), reſtrain the Tenant from committing Waſte, where it is diſpuniſhable by Law, either by the Nature of his Eſtate, or by expreſs Grant of *without Impeachment of Waſte*; but where, by the Agreement of the Parties, the Leaſe is made *without Impeachment of Waſte*, Equity will not reſtrain the Leſſee from cutting Timber, plowing, opening Mines, *&c.* though ſuch Leſſee ſhall be reſtrained from pulling down Houſes, defacing Seats, *&c.* Hard 96. 1 Chan Rep. 13, 14, 106, 116. 2 Vern. 392, 711. 1 Salk. 161. 2 Chan. Ca. 32. 2 Chan. Rep. 94.

4. If *A.* is Tenant for Life, Remainder to *B.* for Life, Remainder to firſt and other Sons of *B.* in Tail Male, Remainder to *B* in Tail, *&c.* and *B.* (before the Birth of any Son) brings a Bill againſt *A.* to ſtay Waſte, and *A.* demurs to this Bill, becauſe the Plaintiff had no Right to the Trees, and no one that had the Inheritance was Party; yet the Demurrer will be over-ruled, becauſe Waſte is to the Damage of the Publick, and *B.* is to take care of the Inheritance for his Children, if he has any, and has a particular Intereſt himſelf, in caſe he comes to the Eſtate. Dayrel v. Champneſs, 1 Eq. Caſ. Abr. 400.

5. On a Motion for an Injunction to ſtay a Jointreſs, who was Tenant in Tail after Poſſibility, *&c.* from committing Waſte; it was urged, that ſhe being Jointreſs within the 11th of *H.* 7. ought in Equity to be reſtrained from cutting Timber, that being Part of the Inheritance, which, by the Statute, ſhe is reſtrained from aliening; and the Court granted an Injunction againſt wilful Waſte in the Site of the Houſe, and pulling down Houſes. Id. Ibid. Cook v. Whaley.

6. But

Id. Ibid. Carew v. Carew.

6. But where a Jointreſs, who had a Covenant that her Jointure ſhould be of ſuch a yearly Value, which fell ſhort, though her Eſtate was not *without Impeachment of Waſte*; yet the Court would not prohibit her committing Waſte, ſo far as to make up the Defect of her Jointure. *But quære if an Action of Waſte be brought againſt her, if Chancery will injoin the Action.*

7. It ſeems to be a general Principal, however, that——

2 Show. 69. pl. 53. Abraham v. Bubb.

8. Tenant in Tail, after Poſſibility, ſhall be reſtrained in Equity from doing Waſte by Injunction, *&c.* becauſe the Court will never ſee a Man diſinherited; *per Chance*, *Finch*. And he took a Diverſity where a Man is not puniſhable for Waſte, and where he hath a Right to do Waſte; and cited *Uvedale*'s Caſe, 24 *Car.* 1. ruled by the Lord *Roll*, to warrant that Diſtinction, 2 *Shaw* 69. *pl.* 53. *Abraham* v. *Bubb.*

A Woman Tenant in Tail, after Poſſibility of Iſſue extinct, was reſtrained from committing Waſte in pulling down Houſes, or cutting down Trees, which ſtood in Defence of the Houſe, and Fruit Trees in the Garden: But for ſome Turrets of Trees, which ſtood a Land's Length or two from the Court, would grant no Injunction, becauſe ſhe had by Law Power to commit Waſte: and yet ſhe was nevertheleſs reſtrained in the Particulars aforeſaid, becauſe they ſeemed to be malicious. 2 Freem. 278, 279. pl. 349.

2 Vern. 152. Claxton v. Claxton.

9. *A.* deviſed Lands, on which Timber was growing, to his Wife for Life, Remainder to *B.* in Fee, paying ſeveral Legacies within a limited Time, and in Default of Payment, the Remainder to *C.* he paying the Legacies; and on a Bill brought by *B.* the Court gave him Leave to cut Timber for the Payment of the Legacies, though it was oppoſed by the Tenant for Life and the Deviſee over, he making Satisfaction to the Widow for breaking the Ground by Carriage, Waſte, *&c.*

2 Vern. 218. Aſſimwall v. Leigh & al.

10. So where a Man created a Term for 500 Years, in Truſt for himſelf and his Wife for Life, Remainder to Truſtees for Payment of Debts and Annuities; and by Will deviſed the Reverſion thereof to *A.* for Life, without Impeachment of Waſte, Remainder to his firſt and other Sons in Tail Male, with Remainder over; and *A.* being in Want, the Court gave him Leave to cut down Timber to the Value of 500 *l.* though the Debts and Annuities were not paid; the Truſtees having no Power to ſell the Timber, the Debts being like to have a long Continuance, and there being a great deal of decaying Timber on the Eſtate.

In what Caſes Waſte may be reſtrained in Equity, notwithſtanding the Words without *Impeachment of Waſte*, be contained in the Leaſe, *&c.*

Plowd. 135.

11. It is true that a Leaſe *without Impeachment* of Waſte, takes off all Reſtraint from the Tenant of doing it; and he may in ſuch Caſe pull up, or cut down Wood or Timber, or dig Mines, *&c.* at his Pleaſure, and not be liable to any Action.

11 Rep. 82. 1 Inſt. 220. 2 Inſt. 146. 6 Rep. 63. Dyer 184.

12. But tho' the Tenant may let the Houſes be out of Repair, and cut down Trees, and convert them to his own Uſe; yet where a Tenant in Fee ſimple made a Leaſe for Years *without Impeachment of* Waſte, it was adjudged that the Leſſor had ſtill ſuch a Property, that if he cut and carried away the Trees, the Leſſee could only recover Damages in Action for the Treſpaſs, and not for the Trees: Alſo it hath been held, that Tenant for Life, without *Impeachment of Waſte*, if he cuts down Trees, is only exempt from an Action of Waſte, *&c.*

Wood's Inſt. 574.

13. And if the Words are, *To hold without Impeachment of any Writ or Action of Waſte*, the Leſſor may ſeize the Trees, if the Leſſee cuts them down, or bring Trover for them.

14. In

14. In many Cases, likewise, the Court of Chancery will restrain Waste, though the Lease, &c. be made *without Impeachment of Waste*. For

15. The Clause of *without Impeachment of Waste*, never was extended to allow the very Destruction of the Estate itself, but only to excuse for *permissive Waste*, and therefore such a Clause would not give Leave to fell or cut down Trees ornamental or sheltring of a House, much less to destroy or demolish a House itself. Thus———

16. A Bill was brought by Remainder-man to restrain Tenant for Life, without Impeachment of Waste, from cutting Timber in *Westwood* Park improper to be felled; and Lord Chanc. granted the Injunction to restrain the Defendant from cutting Timber, which served for Shelter or Ornament to the House, or which grew in Lines, Avenues, or Ridings for Ornament, and also any other Timber in the Park, which was not of proper Growth to be felled.—And his Lordship in this Case declared, that Courts of Equity had in this Respect established Rules much more restrictive than those of the Common Law; which gave Tenant for Life, without Impeachment of Waste, as large a Power over the Timber, as Tenant in Fee simple, that Timber might be had for publick Use. MS Rep. in Chanc. 1744. Packington v. Packington.

17. Likewise, where *A.* upon his Marriage settled Lands to the Use of himself and *M.* his Wife, and the Heirs of their two Bodies; afterward *A.* died without Issue, *M.* married *D.* the Defendant, being then Tenant in Tail after Possibility of Issue extinct: and *M.* and *D.* having felled some Trees in a Grove that grew near, and was an Ornament to the Mansion House, and having an Intention to fell the rest; the Plaintiff, to whom the Lands did belong in Remainder, brought his Bill to restrain *M.* from felling those Trees, and to have an Injunction to stay the committing of Waste. This Cause was referred, and if the Parties could not agree, then to be set down again. But Lord Ch. *Nottingham* discovered his Inclination *fortiter* for granting an Injunction. 2 Freem. Rep 53. Abraham v. Bubb. His Lordship said, if there be Tenant for Life without Impeachment of Waste, and he goes to pull down the Houses, &c. to do Waste maliciously, this Court will restrain, although he hath express Power by the Act of the Party to commit Waste; for this Court will moderate the Exercise of that Power, and will restrain extravagant humorous Waste, because it is *pro Bono Publico* to restrain it; and he said he never knew an Injunction denied, to stay the pulling down of Houses by Tenant for Life without Impeachment of Waste, unless it were to Serjeant Peck in Lord Oxford's Case, and said, he believed he should never see this Court deny it again. Ib. 54.

18. So where a Lease was made by a Bishop for twenty-one Years, *without Impeachment of Waste*, of Land that had many Trees upon it, and the Tenant cut down none of the Trees till about half a Year before the Expiration of his Term, and then began to fell the Trees; the Court granted an Injunction. For though he might have felled Trees every Year from the Beginning of his Term, and then they would have been growing up again gradually, yet it is unreasonable that he should let them grow till towards the End of his Term, and then sweep them all away: For though he had Power to commit Waste, yet this Court will model the Exercise of that Power. 2 Freem. 55. Abraham v. Bubb.

19. So in the Case of Tenant for Life; Remainder to the first Son for Life, *without Impeachment for Waste*, with Remainder over, the first Son, by the Leave of the Lessee of Tenant for Life, comes upon the Land, and fells the Trees, although he could not in that Case be punished by an Action of Waste, yet he was injoined by this Court. Id. Ibid.

20. Likewise where *A.* on the Marriage of his eldest Son, in Consideration of 10,000*l.* Portion, settled *(inter alia) Ruby Castle* on himself for Life, *without Impeachment of Waste*, Remainder to his Son for Life, and to his first and other Sons in Tail Male; afterwards, having taken some Displeasure to his Son, he got 200 Workmen together, and of a sudden stripped the Castle of the Lead, Iron, Glass, Doors and Boards, &c. to the Value of 3000*l.* And the Court, on the Son's filing his Bill, granted an Injunction 2 Vern. 738, 739. 1 Salk. 161. S. C Vane v. Lord Bernard.

Injunction to ſtay committing of Waſte in pulling down the Caſtle, and upon hearing the Cauſe, decreed not only the Injunction to continue, but that the Caſtle ſhould be repaired, and put in the ſame Condition it was in; and for that Purpoſe a Commiſſion was to iſſue to aſcertain what ought to be repaired, and a Maſter to ſee it done at the Charge and Expence of the Father, and the Son to have his Coſts.

1 P. Williams 527. Biſhop of London *v.* Webb. His Lordſhip ſaid, that before the Statute of Glouceſter, Waſte did not lie againſt Leſſee for Years,

21. Biſhop of *London*, in *Edward* the Sixth's Time, made a long Leaſe, of which there were about twenty Years to come, and the Leaſe was made *without Impeachment of Waſte*; *W.* in whom by ſeveral mean Aſſignments the Remainder of this Leaſe was veſted, articled with Brickmakers, that they might dig and carry away the Soil of twenty Acres ſix Feet deep, provided they did not dig above two Acres in the Year, and levelled thoſe Acres before they dug up others. The (now) Biſhop of *London* having the Inheritance in Right of his Biſhoprick, brought a Bill to injoin the digging of the Ground for Brick; Lord Chanc. *Parker* directed, that *W.* might carry off the Brick he had dug, but ordered an Injunction to ſtop further digging.

and the being *without Impeachment of Waſte* ſeems originally intended only to mean, that the Party ſhould not be puniſhable by that Statute, and not to give a Property in the Trees or Materials of an Houſe pulled down by Leſſee for Years *ſans Waſte*; but he ſaid, that the Reſolutions having eſtabliſhed the Law to be otherwiſe he would not ſhake it much leſs carry it further, and that he took this Caſe, the Biſhop of London *v.* Webb, to be within the Reaſon of Lord Barnard's Caſe; where as he was not permitted to deſtroy the Caſtle, to the Prejudice of the Remainder-Man, ſo neither ſhall the Leſſee in the preſent Caſe deſtroy this Field againſt the Biſhop, who has the Reverſion in Fee, to the Ruin of the Inheritance of the Church. Ibid. 528, 529.

(O) What Relief may be given in Equity, in Caſes of Waſte.

MS. Rep. Wilſon *v.* Bragg. 3 March 1742.

1. A Bill was brought to reſtrain Tenant in Dower from getting Peat; Lord Chancellor diſmiſſed it with Coſts, as it appeared to be vexatious; the Peat ſhe ſold not being above the Value of 10 *d.* But herein it was ſaid, that digging Peat is in many Places the ordinary Boot; and perhaps the only Fruit that can ariſe from the Land. They do not carry away the Soil, for they dig off the Turff, then take away the Peat, and lay the Turf down again: And Tenant for Life can no more dig Peat to ſell, than cut down Timber to ſell; and the Chancellor ſaid, if he was to give any Relief, he muſt direct an Iſſue; but that the Cauſe was of too frivolous a Nature to maintain the Expence.

2 Vern. 392. Hanſon *v.* Derby.

2. A Bill being brought to redeem a Mortgage, on the Hearing, an Account was decreed, and 240 *l.* reported due; to which Report the Plaintiff had taken Exceptions. The Cauſe thus ſtanding in Court, the Lord Keeper, on a Motion, and reading Affidavits, that the Defendant had burnt ſome of the Wainſcot and committed Waſte, ordered the Defendant to deliver up Poſſeſſion to the Plaintiff, who was a *Pauper*, giving Security to abide that Event of the Account.

MS. Rep. Mich. Vac. 1733. Lord Caſtlemain *v.* Lord Craven.

5. *A.* Tenant for Life, Remainder to Truſtees to preſerve, *&c.* Remainder to *C.* the Plaintiff in Tail, Remainder over, with Power to *A.* with Conſent of Truſtees, to fell Timber, and the Money ariſing to be veſted in Lands, *&c.* to the ſame Uſes, *&c.* *A.* felled Timber to the Value of 3000 *l.* with Conſent of Truſtees, who never intermeddled, and *A.* had ſuffered ſome of the Houſes to go out of Repair. *C.* by Bill prayed an Account and Injunction. The Maſter of the Rolls ſaid, that the Timber might

might be considered under two Denominations, to wit, such as was thriving and not fit to be felled; and such as was unthriving, and what a prudent Man and a good Husband would fell, &c. and ordered the Master to take an Account, &c. And the Value of the former, which was Waste, and therefore belongs to the Plaintiff, who is next in Remainder of the Inheritance, is to go to the Plaintiff, and the Value of the other is to be laid out according to the Settlement, &c. But as to Repairs the Court never interposes in Case of *Permissive Waste*, either to prohibit or give Satisfaction, as it does in Case of *Wilful Waste*; and where the Court have Jurisdiction of the Principal, *viz.* the prohibiting, it does in consequence give Relief for Waste done, either by Way of Account, as for Timber felled, or by obliging the Party ro rebuild, &c. as in Case of Houses, &c. and mentioned Lord *Barnard*'s Case as to *Raby* Castle. 2 *Vern.* But as to Repairs, it was objected, that the Plaintiff here had no Remedy at Law by Reason of the mean Estate for Life to the Trustees, between Plaintiff's Remainder in Tail, and Defendant's Estate for Life, and that therefore Equity ought to interpose, &c. and that this was a Point of Consequence. *Sed non allocatur.*

4. A Lord of a Manor may bring a Bill for an Account of Oar dug, or Timber cut by the Defendant's Testator.—Thus

5. A customary Tenant of Lands, in which was a Copper Mine, that never had been opened, opened the same, and dug out and sold great Quantities of Oar, and died; and his Heir continued digging and disposing of great Quantities out of the said Mine. The Lord of the Manor brought a Bill in Equity against the Executor and Heir, praying an Account of the said Oar; and alledged that these Customary Tenants were as Copyhold Tenants, and that the Freehold was in the Plaintiff as Lord of the Manor and Owner of the Soil; and that the Manner of passing the Premisses, was by Surrender into the Hands of the Lord, to the Use of the Surrenderee. It was insisted for the Defendants, that it did not appear, that the Admittance in this Case was to hold *ad Voluntatem Domini secundum Consuetudinem*, &c. without which Words, it was insisted, that there could be no Copyhold, as had been adjudged in L. Ch. J. *Holt*'s Time. And L. Ch. *Cowper* said it would be a Reproach to Equity to say, that where a Man has taken another's Property, as Oar, or Timber, and disposed of it in his Life-time and dies, there should be no Remedy. P. Will. Rep. 406. pl 112. Bp. of Winchester *v.* Knight. But his Lordship said in this Case, that as to the Trespass of breaking up Meadow or ancient Pasture-Ground, that it dies with the Person. Id. Ibid.

6. Converting a Brewhouse into Tenements of a greater Value, is Waste, notwithstanding the Melioration, by Reason of the Alteration of the Nature of the Thing and of the Evidence; and so resolved on a Trial before *Hale* Ch J. and the Jury gave the Verdict accordingly, and 100 Marks single Damages, which being trebled amounted to 200 *l.* which the Chancery compelled *Cole* to take. Lev. 311. Cole *v.* Green.

7. Lessee for 500 Years, of Land about 200 *l.* a Year, built several Houses, and thereby improved the Rents from 200 *l* a Year to 1400 *l.* a Year, and quietly enjoyed the same for twenty Years and more, and then an Action of Waste was brought for pulling down a Brick Wall, and cutting down Fruit-Trees, and digging Gravel for laying the Foundations of the Houses built on the said Ground. He brought a Bill setting forth, that such Building could not be accounted any Waste, but rather a Melioration and Improvement of the Land. The Defendant pleaded the Statute, by which Provision is made for bringing Actions of Waste. But the Court over-ruled the Plea, and ordered the Defendant to answer and to speed the Cause. Fin. Rep. 135. Wild *v.* Sir Ed. Stradling.

8. An Under-Tenant of a Jointress commits Waste *sparsim*, so as at Law the Estate was forfeited, but insisted that he had improved the Estate from 40 *l.* to 60 *l. per Annum*, and offered to take a Lease of it at that Rent for 2 Vern. R. 203 pl. 247. Ligow Smith and Leigh.

for 50 Years, and to anſwer the Value of the Timber on a *Quantum Damnificatus*. Quære.

2 P. Will. 240. Whitfield *v.* Bewit.

9. One ſeized in Fee of Lands in which there were Mines, all of them unopened, by a Deed conveyed thoſe Lands, and all Mines, Waters, Trees, *&c.* to Truſtees and their Heirs, to the Uſe of the Grantor for Life, (who ſoon after died) Remainder to the Uſe of *A.* for Life, Remainder to his firſt, *&c.* Son in Tail Male ſucceſſively, Remainder to *B.* for Life, Remainder to his firſt, *&c.* Son in Tail Male ſucceſſively, Remainder to his two Siſters *C.* and *D.* and the Heirs of their Bodies, Remainder to the Grantor in Fee. *A.* and *B.* had no Sons, and *C.* one of the Siſters died without Iſſue, by which the Heir of the Grantor as to one Moiety of the Premiſſes, had the firſt Eſtate of Inheritance: *A.* having cut down Timber and ſold it, and threatened to open the Mines, the Heir of the Grantor, being ſeized of one Moiety *ut ſupra*, by the Death of one of the Siſters without Iſſue, brought his Bill for an Account of the Moiety of the Timber, and to ſtay *A.*'s opening of any Mine: And it was adjudged the Right to this Timber belongs to thoſe, who at the Time of its being ſevered from the Freehold, were ſeized of the firſt Eſtate of Inheritance, and the Property becomes veſted in them.

Vin. Abr. tit. Waſte, p. 523. cites MSS. Rep. 1 Geo. 1. in Canc. Turner *v.* Buck.

10. A Bill was brought againſt the Executors of a Jointreſs to have a Satisfaction out of Aſſets for *Permiſſive Waſte* upon the Jointure of the Teſtatrix, *&c.* But by *Cowper* J. the Bill muſt be diſmiſſed; for here is no Covenant that the Jointreſs ſhall keep the Jointure in good Repair; and in the common Caſe, without ſome particular Circumſtances, there is no Remedy in Law or Equity for permiſſive Waſte after the Death of the particular Tenant.

1 Vern. 158. Brown *v.* Brown.

11. It has been ſaid in Equity, that Remainder-Man for Life ſhall, in Waſte, recover Damages in Proportion to the Wrong done to the Inheritance, and not in Proportion only to his own Eſtate for Life.

MSS. Rep. Garth *v.* Cotton, 26 Geo. 2.

12. *A.* being Tenant for ninety-nine Years, if he ſhould ſo long live, with Truſtees to preſerve Remainder to his firſt and other Sons in Tail, Remainder to *B.* in Tail. *A.* and *B.* before Iſſue born of *A.* fell Timber. The eldeſt Son of *A.* afterwards brings his Bill for an Account and Satisfaction of the Timber againſt *B.* *Per* Lord Ch. Plaintiff has no Remedy at Law, either in his own Name, or in the Name of his Truſtees. *A.* if he had not conſented to it, ſhould have brought Treſpaſs; for Tenant for Years is conſidered as a Fiduciary for Remainder-Man or his Leſſor. If *A.* had had an Eſtate for Life, and no Limitation to Truſtees, the Plaintiff could have had no Remedy; becauſe Tenant for Life might have barred, or ſurrendered the whole Eſtate to the Remainder-Man: But here the Freehold was in the Truſtees; and the Poſſeſſion of Leſſee for Years is in Law the Poſſeſſion of the Owner of the Freehold. The Truſtees however could not here have maintained Waſte, becauſe the Common Law gave no Action of Waſte, but to the Owner of the Inheritance; and the Statute of *Glouceſter* gives the Writ to the ſame Perſon; but the Truſtee is in no other Condition than Remainder-Man for Life. Truſtees may bring a Bill in Equity to ſtay Waſte, before the contingent Remainder comes in *eſſe*. If the Truſtees had brought ſuch a Bill, the Court, as to Trees actually cut, would have obliged them to have made Satisfaction in Money, to have been ſecured to attend the contingent Uſes. Where there is Tenant for Life or Years ſubject to Waſte, and Timber is blown down, the Owner of the firſt Remainder in Tail veſted, ſhall have it; for the Common Law conſiders an Eſtate in Contingence as no Eſtate: And when the Tree is ſevered the Property veſts in Somebody. If there be Tenant for Life, Remainder in Life, Remainder in Fee, Remainder-Man can have no Action for Waſte, becauſe Plaintiff muſt recover the Place waſted, which would be

Injuſtice

Injuſtice to the Remainder over; but ſuch a Remainder-Man of the Inheritance after the intervening Eſtate may have Trover for the Trees, and if Remainder-Man for Life dies, in the Life of Remainder-Man in Fee, he may bring Waſte.

13. Though an Injunction is a proper Remedy, yet it has never been determined that a Bill for an Account cannot be maintained afterward: And though a Recovery was ſuffered after Waſte done, it was to the Uſe of Plaintiff and his Heirs, which is no new Uſe, and ought not to bar Waſte in Equity. It is true, Action of Waſte dies with the Perſon; but though Waſte will not lie at Law, as the Perſon committing it is dead, yet he may have Relief in this Court. It is held in all Caſes of Fraud, the Remedy never dies with the Perſon, but Relief may be had againſt the Executor out of Aſſets; and this Court will follow the Aſſets of the Party liable to the Demand; and Colluſion in this Court is the ſame as Fraud.——Decreed a Satisfaction to be made to the Plaintiff, for the Value of the Timber, as he is now Tenant in Fee of the Eſtate; but would not give any Intereſt, as that would be carrying it too far.

Of Wills and Teſtaments.

1. SEVERAL Branches of theſe Heads having been already treated of under the Articles *Deviſes*, *Executors* and *Adminiſtrators*, and *Legacies*, little more remains than to conſider what formal Circumſtances are neceſſary to the Perfection of a Will and Teſtament, and by what Means, and for what Cauſes they may be avoided.

For the better underſtanding of theſe Particulars, we will arrange the Matter relative to the Reſidue of this Subject under the following Diviſions, and inquire,

(A) What is a Will and Teſtament, and wherein they differ.

(B) Who are capable of making a Will and Teſtament.

(C) What are the Requiſites to conſtitute a good Will.

(D) Of the ſeveral Kind of Wills.—Wherein,

1. Of Wills in Writing—And here,
   1. What ſhall be a good Will in Writing to paſs Lands and Tenements, *&c.*——Wherein,
      1. In what Language and Hand a Will may be Written.
      2. Of the Circumſtances of Signing, Atteſtation, Publication, *&c.*
      3. Of the Republication: — As what will amount to a Republication, and where a Republication will make a Deviſe good.
   2. What ſhall be a good Will in Writing of Goods and Chattels.
   3. What ſhall be a ſufficient Proof of a Will.—Wherein,
      1. In what Caſes Deviſees, Legatees, and Creditors may be admitted to prove a Will.—And
      2. What the Law is where the Probate differs from the original Will.
2. Of Nuncupative Wills.

(E) Of the Nature and Effect of a Will and Teſtament.

(F) How Wills, &c. may be conſtrued.

(G) How Wills may be avoided.—Wherein,

1. What ſhall be deemed a Revocation of a Will.
2. Where a Will ſhall be ſet aſide for Fraud, *&c.*
3. Where Fraud in obtaining a Will is examinable.

(A) What

(A) What is a Will and Teſtament, and wherein they differ.

1. A Teſtament, is a juſt and compleat Declaration or Sentence of a Man's Mind, or laſt Will of what he would have to be done with his Eſtate after his Death.—Or, according to ſome,— Terms de Ley Voc. Teſtament. Swinb. Part 1. ſ. 2. & 4. Shep. Abr. Part 4. Voc. Teſtament.

2. A Will, is a Declaration of the Mind, either by Word or Writing, in diſpoſing of an Eſtate; and to take Place after the Death of the Teſtator. Carth. 38. Lea *v.* Lib. A Will ſhall have Relation only to Teſtator's Death, and not to the making, for till his Death he is the Maſter of his own Will; and therefore the Will of a Papiſt in *Ireland* was held to be avoided by a ſubſequent Statute made in that Kingdom, which enacts that the Lands of Papiſts there ſhall not be deviſeable, but deſcend in Gavelkind. Vin. Abr. Tit. Deviſe, (H. b.) p. 273 Ca. 7.

3. It is in Latin called *Teſtamentum*, i. e. *Taſtatio Mentis*, the Witneſs of a Man's Mind, and to deviſe by Teſtament, is to ſpeak by a Man's Will, what his Mind is to have done after his Death: And it is ſometimes called a Will, or laſt Will, for theſe Words are *ſynonyma*, and are promiſcuouſly uſed in our Law: However, by the Civil Law, it is only ſaid to be a Teſtament when there is an Executor made and named in it, and when there is none, it is but a Codicil only: For a Codicil is the ſame that a Teſtament is, excepting that it is without an Executor; and a Man can make but one Teſtament that can take Effect, but he may make as many Codicils as he will. Id. Ibid. 1 Inſt. 111. Swinb. Part 1. ſ. 5.

4. And by the Common Law, where Lands or Tenements are deviſed in Writing, although there be no Executors named, yet there it is properly called a Laſt Will; and where it doth concern Chattels only, a Teſtament. 1 Inſt. 111.

5. He who makes the Teſtament, is called the Teſtator; and when a Man dies without a Will, he is ſaid to die *inteſtate*. Shep. Abr. Part 4. Voc. Teſtament.

6. A teſtamentary Schedule without Witneſſes or an Executor, has been declared a Will. 2 Ld. Raym. 1282. Powel *v* Beresford.

(B) Who are capable of making a Will and Teſtament.

1. AN Infant, until he be of the Age of twenty-one Years, can make no Will of his Lands by Statute of 32 & 34 *H.* 8. But by ſpecial Cuſtom in ſome Places, where Land is deviſeable by Cuſtom, he may deviſe it ſooner; and of his Goods and Chattels, if he be a Boy, he may make a Will at fourteen Years of Age, and not before; and if a Maid, at twelve Years of Age, and not before: And then they may do it without and againſt the Conſent of their Tutor, Father or Guardian. 32 H. 8. c. 1. and 34 H. 8. c. 5. Swinb. Part. 11. ſec. 2.

2. If he or ſhe hath attained to the laſt Day of fourteen or twelve Years, the Teſtament by him or her in the very laſt Day of their ſeveral Ages aforeſaid, is as good and lawful, as if the ſame Day were already then expired. Id. Ibid.

3. Likewiſe

Swinb. Part 11. ſec. 2. 4. Likewiſe, if after they have accompliſhed theſe Years of fourteen or twelve, he or ſhe do expreſsly approve the Teſtament made in their Minority, the ſame by this new Will and Declaration is made ſtrong and effectual.

1 Inſt. 89. b. 5. And yet ſome ſay an Infant cannot make a Will of his Goods and Chattels, until he be eighteen Years of Age.

2 Vern. 469. 6. It has however been agreed in Equity, that a Female may make a Will at twelve Years of Age of a perſonal Eſtate, and a Male at ſeventeen Years of Age, or fifteen, if he be a Perſon of Diſcretion.

12 H. 7. c. 24. Perk. ſec. 502. Fitz. Exec. 40. 7. A Feme Covert cannot make a Will of her Lands and Goods, except it be in ſome ſpecial Caſes: For of her Lands ſhe can make no Will with or without her Huſband's Conſent, *Stat.* 32 & 34 *H.* 8. 4 *Rep.* 51. *Br. Teſtament* 13.—But of the Goods and Chattels ſhe has as Executrix to any other, ſhe may make an Executor without her Huſband's Conſent; for if ſhe does not ſo, the Adminiſtration of them muſt be granted to the next of Kin to the deceaſed Teſtator, and ſhall not go to the Huſband.

Plowd. 526. 8. But even of them ſhe can make no Deviſe with or without her Huſband's Leave, for they are not deviſeable; and if ſhe deviſe them, the Deviſe is void.

12 H. 7. 24. 18 Ed. 4. 11. Perk. ſec. 501. Fitz. Exec. 5, 28, 109. Br. Teſt. 11. 9. Of the Things due to the Wife, whereof ſhe was not poſſeſſed during the Marriage, as Things in Action, and the like, ſhe may make her Will, at leaſt ſhe may make her Huſband Executor of her *Paraphernalia*, *viz.* her neceſſary wearing Apparel, being that which is fit for one of her Rank. Some ſay ſhe may make a Will without her Huſband's Leave, others doubt of this; however all agree, that ſhe, and not his Executor, ſhall have this after her Huſband's Death; and that the Huſband cannot give it away from her; and of the Goods and Chattels her Huſband has either by her or otherwiſe, ſhe may not make a Will without the Licence and Conſent of her Huſband firſt had ſo to do: But with his Leave and Conſent ſhe may make a Will of his Goods; and make him her Executor if ſhe will. And it is ſaid alſo, that if ſhe does make a Will of his Goods in Truth without his Leave and Conſent, and after her Death he ſuffers the Will to be proved, and delivers the Goods accordingly, in this Caſe the Teſtament is good: And yet if the Huſband gives the Wife Leave to make a Will of his Goods, and ſhe does ſo, he may revoke the ſame at any Time in her Life-time, or after her Death, before the Will is proved. But a Woman after a Contract with any Man, before the Marriage, may make a Will as well as any other, and is not at all diſabled hereby.

2 Vern. 104. 10. Likewiſe, a Wife, whoſe Huſband is baniſhed by Act of Parliament for Life, may make a Will as a Feme ſole.

Swinb. Part 11. ſ. 3. 11. A mad or lunatick Perſon, during the Time of his Inſanity of Mind, cannot make Will of Lands or Goods; but ſuch a one as hath his *lucida Intervalla*, clear or calm Intermiſſions, may, during the Time of ſuch Quietneſs and Freedom of Mind, make his Will, and it will be good.

Id. Part 11. ſec. 4. 12. So alſo, an Idiot, *i. e.* ſuch an one as cannot number twenty, or tell what Age he is, or the like, cannot make a Will or diſpoſe of his Lands or Goods; and although he make a wiſe, reaſonable, and ſenſible Will, yet it is void: But ſuch a one as is of a mean Underſtanding only, that has *groſſum Caput*, and is of the middle Sort, between a wiſe Man and a Fool, is not prohibited to make a Will.

Id Ibid. Part 11 ſ. 1. 6 Rep. 23. Marquis of Winchester's Caſe. 13. An old Man likewiſe, who, by Reaſon of his great Age, is childiſh again, or ſo forgetful that he forgets his own Name, cannot make a Will, for a Will made by ſuch an one is void.

14. So

14. So alſo it ſeems a drunken Man, who is ſo exceſſively drunk that he is deprived of the Uſe of his Reaſon and Underſtanding, during that Time may not make a Will; for it is requiſite that when the Teſtator makes his Will that he be of ſound and perfect Memory, *i. e.* that he have a competent Memory and Underſtanding to diſpoſe of his Eſtate with Reaſon. Swinb. Part 11. ſ. 1. and ſec. 6.

15. A Man who is both deaf and dumb, and is ſo by Nature, cannot make a Will; but a Man who is ſo by Accident, may by Writing or Signs make a Will; and ſo may a Man who is deaf or dumb by Nature or Accident. Id. Part 11. ſ. 1. & 10.

16. And ſo alſo may a Man that is blind. Id. Part 1. ſ. 1. & 11.

17. But an Alien Enemy, Perſons convicted and *attainted*, and Recuſants convict, cannot make a Teſtament of Lands or Goods. Wood, Inſt. 335.

18. Neither may the Head, or any of the Members of a Corporation, make a Will of the Lands or Goods they have in Common, for they ſhall go in Succeſſion. Fitz. Abr. Teſt. 1. Perk. ſ. 498.

19. A Traitor attainted, from the Time of the Treaſon committed, can make no Will of his Lands or Goods, for they are forfeited to the King: But after the Time he has a Pardon from the King for his Offence he may make a Will of his Lands and Goods as any other Man. Swinb. Part 11. ſ. 12. 5 & 6 Ed. 6. c. 11. ſ. 9. So if he dies before Attainder, his Will is good. Likewiſe his Will of Goods, which he hath as Executor to another, is good, for they are not forfeited. Id. Ibid.

20. A Man who is attainted or convicted of Felony cannot make a Teſtament of his Lands or Goods, for they are forfeited: But if a Man be only indicted, and dies before the Attainder, his Will is good for his Lands and Goods both; and if he be indicted, and will not anſwer upon his Arraignment, but ſtands Mute, *&c.* in this Caſe his Lands are not forfeited, and therefore he may make a Will of them. Swinb. Part 11. ſ. 13. N. B. The Forfeiture of a Felon's Lands relates the Time of the Fact committed, but the Forfeiture of Goods, to the Time of the Judgment given.

21. And if a Man kill himſelf, his Will as to his Goods and Chattels is void, but as to his Lands is good. Plow. 61. Hales v. Petit.

22. A Man likewiſe who is outlawed in a Perſonal Action cannot make a Will of his Goods and Chattels, ſo long as the Outlawry continues in Force, but of his Lands he may make a Will. Swinb. Part 11. ſ. 21.

23. But note, That however the Wills of Traitors, Aliens, Felons, and outlawed Perſons are void as to the King or Lord that has Right to the Lands or Goods by Forfeiture or otherwiſe; yet the Will is good againſt the Teſtator himſelf, and all others but ſuch Perſons only. Wood, V. 1. 791. Shep. Abr. Part 4. Voc. Teſtament.

24. And note alſo, By the Civil Law the Wills of divers others, as excommunicate Perſons, Hereticks, Uſurers, inceſtuous Perſons, Sodomites, Libellers, and the like, are void; but by our Law the Wills of ſuch Perſons, at leaſt as to their Lands, are good by the Statutes that enable Men to deviſe their Lands. Id. Ibid.

25. In ſhort, all Perſons whatſoever, male or female, old or young, lay or ſpiritual, at any Time before their Death, whilſt they are able to ſpeak ſo diſtinctly, or write ſo plainly, that another may underſtand them, and perceive that they underſtand themſelves, may make Wills of their Lands, Goods and Chattels, and that although they have ſworn to the contrary; and none are reſtrained of this Liberty, but ſuch as are before named. Id. Ibid.

(C) What are the Requiſites to conſtitute a good Will.

1. TO conſtitute a good Will it is neceſſary,

2. Firſt, That the Teſtator be a Perſon legally capable of making a Will. *See who are capable of making a Will*, B. *ante*.

Shep. Abr. Part 4. p. 13. Voc. Teſt'. 3. Secondly, The ſecond Thing required to the making of a good Teſtament, is, that there be a Perſon to take, and one that is capable; for in all Gifts by Deviſe, or otherwiſe, that are good, there muſt be a Donee in *eſſe*, and not in *poſſe* only, and one that ſhall have Capacity to take the Thing given, when it is to veſt, or the Gift ſhall be void.

Id. Ibid. Plow. 345. Brett *v.* Rigden. 4. And hence it is, that where the Deviſee of Lands or Goods, or an Executor of a Will, doth die before the Deviſor, or him that makes the Will, the Deviſe and Will is void, and that neither the Heir or Executor ſhall have the Thing deviſed.

1 And. 60. Amner *v.* Luddington. 5. A Deviſe to the Wife for Life, and after to the Children unpreferred, is good.

2 And. 11. Garmyn *v.* Arſtete. 6. But a Deviſe by a Man to his Heir and his Heirs is void.

Shep. Abr. Part. 4. p. 13. Voc. Teſt'. 7. One deviſed his Leaſes of Lands to *B.* his eldeſt Son, except the Sum of 140*l.* to be paid out for Portions for his Daughters, and made *B.* his Executor; and held a good Deviſe to them after this Manner, and that the Daughters might ſue for it in the Eccleſiaſtical Court, or Court of Equity.

Cro. Eliz. 532. Bon *v.* Smith. 8. If one Deviſe to the Son in Tail, and if he die without Iſſue, to the next of his Name; the Daughter after married cannot have it, for ſhe is not of his Name. But if ſhe had not been married, ſhe would have had it, as being next of the Name. Id. Ibid.

3 Leon. 11. 9. One ſeiſed of a Manor and Lands, deviſeth the ſame to his Son, and after, by another Part of his Will, deviſeth Part of the ſame to another of his Sons; theſe Deviſes are good, and they ſhall be Jointenants.

10. Thirdly, That the Teſtator, at the Time of making his Will, have *Animum Teſtandi*, *i. e.* a Mind or ſerious Intention to make ſuch Will.

Swinb. Part 1. ſ. 3. 11. For it is the Mind, not the Words of the Teſtator, that gives Life to the Will: Since if a Man raſhly, unadviſedly, incidently, jeſtingly or boaſtingly, and not ſeriouſly, writes or ſays, that ſuch a one ſhall be his Executor, or have all his Goods, or that he will give to ſuch a one ſuch a Thing; this is no Will, not to be regarded. And the Mind of the Teſtator herein is to be diſcovered by Circumſtances; for if at the Time he be ſick, or ſets himſelf ſeriouſly to make his Will, or requires Witneſſes to bear Witneſs of it, it ſhall be deemed in Earneſt; but if it be by Way of Diſcourſe only, or of ſomewhat he will do hereafter, or the like, it ſhall be taken for nothing.

12. Fourthly, That the Mind of the Teſtator in making his Will be Free, and not moved by Fear, Fraud or Flattery.

Id. Ibid. Part 11. ſ. 25. and Part 7. ſ. 2, 3, & 4. 13. For when a Teſtator is moved to make his Teſtament by Fear or circumvented by Fraud, or overcome by ſome immoderate Flattery, the ſame is void, or at leaſt voidable by Exception: And therefore, if a Man, by Occaſion of ſome preſent Fear or Violence, or threatning of future Evils, does at the ſame Time, or afterwards by the ſame Motive, make a Will, it is void, not only as to him that puts him ſo in Fear, but as to

to all others, although the Teſtator confirms it with an Oath; but if the Cauſe of Fear be ſome vain Matter, or, being weighty, is removed, and the Teſtator afterwards, when the Fear is paſt, confirms the Teſtament, in this Caſe, perhaps, the Will may be good. And if a Man, by Occaſion of ſome Fraud * or Deceit, be moved to make a Will, if the Deceit be ſuch as may move a prudent Man or Woman, and if the End be Evil alſo, the Will is void, or voidable at the leaſt; but if the Deceit be light and ſmall, or if it be to a good End, as where a Man is about to give all his Eſtate to ſome lewd Perſon, from his Wife and Children, and they perſuade the Teſtator, that the lewd Fellow is dead, or the like, and thereby procure him to give his Eſtate to them, this is a good Will. And one may, by honeſt Interceſſions, and modeſt Perſuaſions, procure another to make himſelf or a Stranger Executor to him, or the like, and this will not hurt the Will; alſo a Man may uſe fair and flattering Speeches to move the Teſtator to make his Will, and to give his Eſtate unto himſelf, or ſome Friend of his; except it be in Caſe where the Flatterer firſt threatens him, or puts him in Fear †, or to his Flattery joins Fraud and Deceit; or where the Teſtator is a Perſon of weak Judgment, or under the Government of the Flatterer, or in Danger from him; as when the Phyſician ſhall perſuade his Patient under his Hand to make his Will, and give his Eſtate to himſelf ‡: Or the Wife attending on her Huſband in his Sickneſs ſhall neglect him, and in the mean Time flatter him to give her all: Or where the Perſuader is importunate, and will have no Denial: Or when there is another Teſtament made before; for in all theſe Caſes, the Will will be in Danger to be avoided. If I be much privy to another Man's Mind, and he tells me often in his Health how he intends to ſettle his Eſtate, and he being ſick, I, of my own Head, draw a Will according to his Mind, before declared to me, and bring it to him, and aſk him, whether this ſhall be his Will or no? And he conſiders of it, and then delivers it back to me, and ſays, Yes; this is a good Will. But if otherwiſe, ſome Friends of a ſick Man, of their own Heads, ſhall make a Will, and bring it to a Man in Extremity of Sickneſs, and read it to him, and aſk him, Whether this ſhall be his Will? and he ſays, Yes, yes: Or if a Man be in great Extremity, and his Friends preſs him much, and ſo wreſt Words from him; eſpecially if it be in Advantage of them, or ſome Friends of theirs: In theſe Caſes the Wills are very ſuſpicious.

* *N. B.* Fraud in Wills of Lands is only examinable in the Courts of Common Law, not of Chancery. Swinb. 478. And Fraud in a Will of perſonal Eſtate is only examinable in Eccleſiaſtical Court. 2 P. Wil. 286. Steventon *v.* Gardiner & *al'*. But ſee *poſtea*.

† For in that Caſe it is to be preſumed that the Teſtator is rather moved by Fear, than by the ſubſequent Flattery.

‡ For the Law will preſume that the Teſtator did it, leſt the Phyſician ſhould neglect or forſake him.

14. Fifthly, That the Will be made in the Form preſcribed by Law.

15. The Forms which the Law preſcribes, differ according to the Species of Property which is to be diſpoſed of, that is, whether it be real or perſonal. And this leads us to conſider the ſeveral Kinds of Wills and Teſtaments, and the Circumſtances requiſite to each.

(D) Of the ſeveral Kinds of Wills and Teſtaments.

1. THERE are two Sorts of Wills or Teſtaments: Firſt, in Writing, which is, where the Mind of the Teſtator, in his Life-time, by himſelf, or ſome other by his Appointment, is put in Writing: Or, ſecondly, by Word, or without Writing, which is, where a Man is ſick, and for fear that Death, or want of Memory or Speech, ſhould ſurpriſe him, that he ſhould be prevented, if he ſtaid the Writing of his Teſtament,

1 Inſt. 111. Perk. ſ. 476. Wood, Part 1. 787.

deſires his Neighbours and Friends to bear Witneſs of his laſt Will, and then declares the ſame preſently, by Word, before them: And this is called a *Nuncupative* or *Noncupatory* Will or Teſtament; and this being after his Death proved by Witneſſes, and put in Writing by the Ordinary, is of as great Force for any other Thing, but Land *, as when at the firſt in the Life of the Teſtator it is put in Writing. See of *Noncupative Wills, poſt.*

* In ſome Cities and Boroughs Lands may paſs as Chattels, by Will Nuncupative or Parol without Writing. 1 Inſt. 111.

Id. Ibid. 2. A Codicil is alſo in Writing or by Word, as a Will or Teſtament is.

3. The Civilians have other Diviſions of Wills and Teſtaments, ſolemn and unſolemn, privileged and unprivileged, whereof the Common Law makes no mention.

1. Of Wills in Writing.

1 Inſt. 111. b. 1 Roll. Abr. 608. 4. By the Common Law, no Lands or Tenements, (except by particular Cuſtom,) were deviſeable by any Laſt Will or Teſtament, neither could they be transferred from one to another, but by ſolemn Livery of Seiſin, Matter of Record or ſufficient Writing *(a)*. Becauſe it was preſumed, that the Teſtator would do that *in Extremis*, that he would not do in his Health; that it proceeded from the Diſtemper of his Mind, by the Anguiſh of his Diſeaſe, or by ſiniſter Perſuaſion, to which in his Sickneſs he was more ſubject. But this being altered by Statute, we are next to inquire.——

(a) The true Reaſon ſeems to be from the Nature of the feudal Tenure and the Relation that was firſt eſtabliſhed betwixt the Lord and his Tenant. For though Donations after Length of Time were made to the Tenant and his Heirs, or the Heirs Males or Females of his Body, under certain Duties and Services expreſsly reſerved, or which the Law created: And though the Word *Heirs, &c.* be Words of Limitation, and appropriated to Meaſure out the Length or Continuance of the Eſtate: Yet they were always underſtood the Heirs of the preſent Tenant, who being liable to the ſame Services when they came into the Tenancy; the Lord was to have the Tuition and Education of ſuch Heirs, in caſe they happened, by Reaſon of their Minority, to be incapable of performing the Services, that ſo he might, by his Care and Diſcipline, ſecure to himſelf Tenants always capable thereof, either in their own Perſons, if they happened to be Males, or by proper Marriages with his Tenants, if they proved to be Females; and therefore by no Act of the Tenant's could he diſpoſe of the Feud, ſo as to defeat the Lord of the Advantages of his Seigniory; and hence it was, that a Tenant could not deviſe it even to his own Heir, ſo as to make him a Purchaſer thereof; for then he coming in not by the Donation of the Lord, but the Diſpoſition of the Tenant, though he remained liable to the naked Services, yet the Lord loſt the Advantages of Wardſhip, Marriages, *&c.* which were annexed only to thoſe who came in, upon the Terms of his own Donation by Deſcent. 1 Eq. Caſ. Abr. 401.

1ſt. What ſhall be a good Will in Writing to paſs Lands and Tenements.

(a) There have been ſeveral Reſolutions concerning Wills made purſuant to this Statute ſince the making thereof: But as the Statute 29 Car. which follows, is now the proper Pattern to follow, having altered the Forms by requiring more Ceremony and greater Exactneſs, it will be ſufficient barely to mention ſome of the Caſes on this Statute of 32 H. 8. (b) That the Lands muſt be *ſua*, and therefore Lands purchaſed after Will is made will not paſs. Vide Plow. 344. (c) A Deviſe of an Authority to Executors to ſell is within the Act. Moor 341. (d) A Man beyond Sea wrote a Letter, in which he declared his Will to be, that his Land ſhould go in ſuch a Manner; and adjudged a good Will. Moor 177. So if a Man had ordered one to make his Will, and thereby to deviſe *Whiteacre* to *A.* and his Heirs, and *Blackacre* to *C.* and his Heirs, and he had written the Deviſe to *A.* but before the Deviſe to *C.* was wrote, the Deviſor died; yet as to *A.* this had been a good Deviſe. 3 Co. 31. b. So a Will was held good where a Lawyer took only ſhort Notes, with Deſign to reduce it into Form, which he afterwards did, but the Deviſor died before it was read to him. 1 And. 34. A Will wrote without the Appointment of the Teſtator, if read to him, and approved by him, was held good, Signing and Sealing was not neceſſary. Cro. Eliz. 100. Dyer 72. a. 2 Leon. 35.

5. "The *(a)* Stat. 32 *H.* 8. *cap.* 1. uſually called the Statute of Wills, "enacts, That every Perſon *(b)* having Manors, Lands, *&c.* ſhall have "Power to give, *(c)* diſpoſe, will, and Deviſe by Will, in *(d)* Writing or "otherwiſe, by Act executed in his Life-time, all his ſaid Manors, *&c.* "any Law, Statute, *&c.* to the contrary notwithſtanding.

And

6. "And farther, by the Statute of Frauds and Perjuries, 29 *Car.* 2 *c.* 3. "*ſec.* 5. all Deviſes and Bequeſts of any Lands or Tenements deviſeable by "the Statute of Wills, or by any particular Cuſtom, ſhall be in Writing, "and ſigned by the Party deviſing the ſame, or ſome other Perſon in his "Preſence, and by his expreſs Directions, and ſhall be atteſted and ſub- "ſcribed in the Preſence of the ſaid Deviſor by three or four credible Wit- "neſſes, or elſe they ſhall be utterly void and of none Effect.

7. "And by *ſec.* 6. no Deviſe in Writing of Lands, Tenements or Here- "ditaments, or any Clauſe thereof, ſhall be revocable, other than by ſome "other Will or Codicil in Writing, or other Writing declaring the ſame, "or by burning, cancelling, tearing or obliterating the ſame by the Teſta- "tor himſelf, or in his Preſence, and by his Directions and Conſent: But "all ſuch Deviſes and Bequeſts ſhall remain in Force until the ſame be "burnt, *&c.* in Manner aforeſaid, or unleſs the ſame be altered by ſome "other Will or Codicil in Writing, or other Writing of the Deviſor, "ſigned in Preſence of three or four Witneſſes, declaring the ſame."

8. Therefore if a Will be of Lands or Tenements, it muſt be in Writing, and it muſt be committed to Writing at the Time of the making thereof; and it is not ſufficient that it be put in Writing after the Death of the Teſtator, being firſt made by Word of Mouth only, for then it is but Nuncupative ſtill: But if the Will be firſt made by Words of Mouth, and be afterwards written, and then brought to the Teſtator, and he approves of it for his Will: Or if the Teſtator, when he declares his Mind, appoints that the ſame ſhall be written, and thereupon the ſame is written accordingly in the Life-time of the Teſtator, theſe are good Wills of Land, and as good as if they had been written at the firſt; therefore if one be very ſick, and another comes to him and aſks him, Whether his Wife ſhall have his Lands? and he ſays, Yes; and a Clerk being preſent, put this in Writing without any precedent Commandment or ſubſequent Allowance of the ſick Man, this is no good Will of the Land. So if one declares his whole Mind before Witneſſes, and ſends for a Notary to write it, and dies before he comes, and he writes it after his Death, this is no good Will of his Lands, but a good Nuncupative Will for his Goods and Chattels, except he declares his Mind to be, that it ſhall not be his Will unleſs it be put in Writing; for then perhaps it may not be a good Will even for his Goods and Chattels. So if he that writes the Will cannot hear the Party ſpeak, and another, that doth ſtand by the ſick Man, tells him what he ſays; in this Caſe, if there be none others preſent to prove that he reported the very Words of the ſick Man, this will be no good Will of the Land. But if a Notary takes Directions from the ſick Man for his Will, and after goes away and writes it, and then brings it again and reads it to the Teſtator, and he approve it; or if it be written from his Mouth by the Notary according to his Mind, and his Mind were to have it written, although it be not ſhewed or read to him afterwards, theſe are good Teſtaments. So if the Notary does only take certain rude Notes or Directions from the ſick Man, which he agrees to, and they be afterwards written fair in his Life-time, and not ſhewed to him again, or not written fair until after his Death; theſe are good Wills of Lands. But if a ſick Man bids the Notary make a Will of his Lands, but does not tell him how, and the Notary make a Deviſe of it after his own Mind, this is no good Will: And yet if it be after read unto him, and approved by the Teſtator, it may be good. If a Will be found Written in the Teſtator's Houſe, and not known by whom, and it be read unto and approved by the Teſtator, this is not a good Will in Writing for Lands and Goods.

Wood, Part 1. 798. Dy. 72. Plow. 345.

9. Having ſhewn how far Writing is neceſſary, it remains to conſider,

1. In

1. In what Language and Hand a Will may be writen.

Swinb. Part 4. ſec. 28. † But N. B. They muſt be ſo framed as to paſs Eſtates according to the Rules of our Law. 1 Vern. 85. Bovey *v.* Smith.

10. It is not material in what Matter or Stuff, whether in Paper or Parchment, nor in what Language, whether in *Latin*, *French*, *Dutch*, †, or any other Tongue, or in what Hand or Letters, whether in Secretary Hand, Roman Hand, or Court Hand, or in any other Hand, a Will be written, ſo that it be fair and legible, that it be read and underſtood: Neither is it material whether the ſame be written at large, or by Notes or Characters uſual or unuſual, as XX *s.* for twenty Shillings, or when the Figuere 1 is uſed inſtead of the Letter *A.* if it be uſual in the Teſtator's Writing, or the like, for the Will is good notwithſtanding. So alſo, if ſome Words be omitted, or improper Sentence uſed, when the Intent and Meaning is apparent; as where a Man ſays, I make my Wife of this my laſt Will and Taſtament, leaving out the Word *Executrix*, yet the Will is good; and this ſhall be underſtood. But if it be ſo done as it cannot be read *, or by reading, the Mind of the Teſtator cannot be known, then the Will is void and of no Force; in like Manner as a Nuncupative Will is when the Words ſpoken are ſo ambiguous, obſcure, and uncertain that thereby the Meaning of the Teſtator cannot be known or underſtood.

* Where a Will was written ſo blindly that it was ſcarce legible, and the Legacies were in Figures, it was referred to a Maſter to examine what thoſe Legacies were, and he to be aſſiſted by ſuch as were ſkilled in the Art of Writing. 1. P. Will. 425. Maſters *v.* Maſters.

11. We now proceed to treat,——

2. Of the Circumſtances of Signing, Atteſtation, Publication, &c.

12. The Clauſes of the 29 *Car.* 2. above recited, having rendered thoſe Circumſtances neceſſary, it is next to be inquired, When, in legal Conſtruction, theſe Requiſites ſhall be deemed to have been complied with; which may be beſt collected by an Attention to the following Caſes.

2 Str. 764. Warneford *v.* Warneford.

13. It has been held, that Sealing of a Will, is a Signing within the Statute of Frauds and Perjuries.

Perk. 477.

14. But a Will in Writing need not be ſealed: But it is added, *Q.* If it be good to paſs Freehold or Inheritance.

3 P. Will. 254. Stonehouſe & Ux. *v.* Evelyn.

15. Where the Teſtator owns his Hand before the Witneſſes who ſubſcribe the Will in the Teſtator's Preſence, the Will is good, though all the Witneſſes did not ſee the Teſtator ſign, and it is obſervable that the Statute of Frauds does not ſay, the Teſtator ſhall ſign his Will in the Preſence of three Witneſſes; but requires theſe three Things; firſt, That the Will ſhould be in Writing. 2dly, That it ſhould be ſigned by the Teſtator. And, 3dly, That it ſhould be ſubſcribed by three Witneſſes in the Preſence of the Teſtator.

2 Str. 1109. Croft *v.* Pawlet.

16. Nevertheleſs a Will has been held to have been well executed, though it was not mentioned in the Atteſtation to have been ſigned in the Preſence of the Teſtator.

2 Ch. Caſ. 109. Anon.

17. If a Will is atteſted by three Witneſſes, who ſeverally ſigned their Names, not being preſent together; yet each Signing being in the Preſence of the Teſtator, makes it a good Will within the Statute.

3 Mod. 262. Lea & Lib.

18. But if a Man ſubſcribes and publiſhes his Will in the Preſence of two Witneſſes, and they ſubſcribe it in his Preſence, and after makes a Codicil in Writing, reciting that he had made a former Will and confirmed the ſame, (except what was excepted by the Codicil) and declares, that the Codicil ſhall be taken as Part of his Will, and publiſhes it in the Preſence of one of the Witneſſes to the firſt Will and another new Witneſs, this is

not

not a good Will, for there were not three ſubſcribing Witneſſes in the Preſence of the Teſtator; and one of the Witneſſes to the Codicil never ſaw the Will. Adjudged, though it was objected, the Will and Codicil made but one Will, and the Circumſtance of three Witneſſes wanting to compleat the Will, was perfected by the Codicil.

19. So if a Man makes a Will in ſeveral Pieces of Paper, and there are three Witneſſes to the laſt Paper, and none of them ever ſaw the firſt; this is not a good Will. 3 Mod 263. Lea v. Libb.

20. A Will of Lands was originally executed in the Preſence of two Witneſſes only, and at the Diſtance of four Years afterward, the Teſtator re executed his Will, by drawing a Pen on the old Strokes, in the Preſence of one other Perſon, who likewiſe ſubſcribed his Name as a Witneſs to it. Upon an Ejectment, brought by the Heir at Law, and on a ſpecial Verdict, it was determined by the Court, that this Will was properly executed, and atteſted, under the Statute of Frauds and Perjuries. MS. Rep. Jones v. Dale. B. R. Hill. 16 G. 2.

21. It was determined by Lord Chancellor, that a Will is well proved, though the Witneſſes did not ſee the Teſtator ſign his Name; if he declared it to be his Hand-writing to them, and they atteſted it in his Preſence, and in the Preſence of each other. MS Rep. Grayſon v. — in Canc. 25, 26 G. 2.

22. A Will was atteſted by three Witneſſes, in the Preſence of Teſtator and of each other, but the Teſtator did not write his Name or put his Seal in their Preſence, but pointed to the Paper and ſaid, that was his Will, and he had wrote it, and that his Name, *William Ellis* ſubſcribed, was his Writing and Name; and laid his Hand on the Seal, and ſaid, that was his Seal. Determined by Lord *Hardwicke*, aſſiſted by L. C. J. *Wills*, *Strange*, Maſter of the Rolls, and the Ch. Baron, on a Queſtion in this Cauſe, whether this Will, ſo executed, was good as a Revocation of a former Will, under the ſixth Section of the Statute of Frauds? And held clearly that it was; it not being doubted but that it was good as an original Will, according to the Authorities determined on this Head, that the owning it to be his Hand-writing was ſufficient. MS. Rep. Ellis v Smith, Hill & Mich. 27 G. 2.

23. The Teſtator deſired the Witneſſes to go into another Room, ſeven Yards diſtant, to atteſt his Will, in which there was a Window broken, through which the Teſtator might ſee them. And it was held, that this Will was according to the Statute of Frauds; for though the Statute requires Atteſting in his Preſence, to prevent obtruding another Will in the Place of a true one, yet it is enough if the Teſtator might ſee. It is not neceſſary that he ſhou'd actually ſee them ſigning; for, at that Rate, if a Man ſhould but turn his Back, or look off, it would vitiate the Will: And the Signing was in the View of the Teſtator; he might have ſeen it, and that is enough. So if the Teſtator, being ſick, ſhould be in Bed and the Curtain drawn. 2 Salk. 688. Shires v. Glaſcock.

24. But where one deviſed Lands to *J. S.* and his Heirs, and duly ſubſcribed his Will in the Preſence of three Witneſſes; who, for the Eaſe of the Teſtator, went down Stairs into another Room, and atteſted the Will there, which was out of the Preſence of the Teſtator; and the Heir at Law was prevailed on to join in a Leaſe and Releaſe of the deviſed Premiſſes, in Truſt for the Deviſee; the Will and the Releaſe were both ſet aſide, for the Releaſe reciting that the Will was duly executed, was *Suggeſti Falſi*, and the concealing from the Heir, that it was not duly executed, was *Suppreſſio Veri*; either of which Circumſtances are good Reaſons for ſetting aſide a Releaſe or Conveyance. 1 P. Will. 239. Broderick v. Broderick.

25. If the Teſtator writes the Will with his own Hand, though he does not ſubſcribe his Name, but ſeals and publiſhes it, and three Witneſſes ſubſcribe their Names in his Preſence, it is a good Will; for his Name being wrote in the Will it is a ſufficient Signing: And the Statute does not direct, whether it ſhall be at the Top, Bottom, &c. and by three Judges againſt one Sealing is a Signing within the Act. And note, it is 3 Lev. 1. Lemayne v. Stanley.

not

not ſaid in the Act, that the Signing ſhall be in the Preſence of the three Witneſſes at the ſame Time.

Comyns's Rep. 197. Peate *v.* Ougley. It was inſiſted, that upon this Evidence it is apparent that the Codicil was wrote before the Execution of the Will; for otherwiſe there was no Reaſon that the Witneſſes ſhould write their Names at the Top of the firſt Side of the Will, and the Words wrote by the Teſtator's own Hand as the Reaſon of it, had been falſe, if the Codicil had not then been upon that Paper. For there would have been

26. *J. S.* before the Statute of 29 *Car.* 2. *viz.* in 1668-9, wrote his Will with his own Hand on a Sheet of Paper, and the Writing went to the Bottom on one Side, and half-way on the Backſide, which Will, at the End of it, had the Name and Seal of *J. S.* and Notice was taken in his own Hand of ſome Interlineations. At a very little Diſtance on the Backſide of the ſame Paper, a Codicil was written, which extended almoſt to the Bottom of the ſame Backſide of the Paper, and was dated 1679, which was after the *Statute of Frauds*, and had the Name of the Deviſor ſubſcribed, and his Seal affixed; in which Codicil a Legacy as to a Houſe was revoked, and the ſame was thereby deviſed to *A.* for Life, and after to his Brothers ſucceſſively, but Notice was not taken of the Names of his Brothers in the Codicil, but they were named in the Will. At the Top of the Will was written, (ſigned, ſealed, and publiſhed, as my laſt Will and Teſtament, in the Preſence of the ſame, being written here for Want of Room below.) This was likewiſe written in the Teſtator's own Hand, and then the Names of the three Witneſſes were ſubcribed; two of thoſe Witneſſes were dead, and the third was produced at the Trial, who teſtified that he was Servant to the Teſtator for four Years, and about twenty ſeven or twenty eight Years ago, he and the other two Witneſſes were called up in the Night, and ſent for into the Teſtator's Chamber, who produced a Paper folded up, and deſired him and the others to ſet their Hands as Witneſſes to it, which they all three did in his Preſence; but they did not ſee any Writing, nor did the Teſtator tell them it was his Will, or ſay what it was; but he believes this to be the Paper, becauſe his Name is there, and the Names of the other Witneſſes, and he never witneſſed any other Deed or Paper for the Teſtator; and though the Teſtator did not ſet his Name or Seal to the Will in their Preſence, yet he had often ſeen him write, and believes the whole Will and Codicil to be of his Hand-writing. And Lord Chief Juſtice *Trevor* inclined that here was ſufficient Evidence to find the Codicil well executed, and the Jury found it accordingly.

ſufficient Room below the Will for the Witneſſes to atteſt it. The Witneſs alſo ſays, that the Execution was about twenty-ſeven or twenty-eight Years ago; which Time is ſubſequent to the Codicil. But it was ſaid, the Execution is ſufficient within the Statute; for there is no Neceſſity that the Witneſſes ſee the Teſtator write his Name; and if he writes theſe Words, Signed, ſealed and publiſhed as his Will, and prays the Witneſſes to ſubſcribe their Names to that, it will be a ſufficient Publication of his Will, tho' the Witneſſes do not hear him declare it to be his Will: And a Caſe was mentioned, determined by Lord Chanc. Shafteſbury, before 29 Car. 2. where a Man wrote his Will with his own Hand, and alſo theſe Words, ſigned and publiſhed in the Preſence of, and no Witneſs had ſubſcribed it; this was held to be a ſufficient Publication. Ibid.

2 Raym. 1282. Powel *v.* Beresford.

27. *A. B.* made a Will or Teſtamentary Schedule, all of his own Hand-writing, as follows; "In the Name of God *Amen*. I *A. B.* do make "this my laſt Will and Teſtament for fear of Mortality, till I can ſettle "it more at large. I do give and bequeath 1000 *l.* unto *D. P.* to be "paid by my Executor (or) Adminiſtrator; and for ſure Payment there-"of, I do charge all the Real and Perſonal Eſtate which I have in the "World, I being very deſirous to make a Proviſion for the ſaid *D. P.* "for ſeveral good Reaſons inducing me thereunto. In Witneſs whereof "I have hereunto ſet my Hand, this preſent 7th Day of *December* 1704. "Signed, *A B.*" And delivered the ſame to the ſaid *D. P.* and about a Fortnight before his Death, *A. B.* did declare he had left with *D. P.* an unqueſtionable Security for 1000 *l.* charged upon his Real and Perſonal Eſtate, and that he had done the ſame for fear of Mortality, till ſuch Time as he could make a full and compleat Will; which he declared he would do as ſoon as his Wife was brought to Bed, but that he waited to ſee if it were Male or Female. He died ſuddenly 6th *February* 1704, leaving his Wife then lying in of a Daughter. The Judge of the Prerogative Court gave Sen-

tence

tence againſt the Will, and pronounced that *A. B.* died inteſtate. On Appeal to the Delegates (among whom were *Holt* Ch. J. *Price* B. and Judge *Dormer*) the Sentence was reverſed, and they pronounced for the Will.

28. *A.* by Will in Writing, atteſted by three Witneſſes, deviſed a Copyhold Eſtate to his Wife: And afterwards the Teſtator on the Day of his Death, directed his Nephew to obliterate ſome Deviſes, but ſaid nothing as to the Copyhold deviſed to his Wife, and then cauſed a Memorandum to be written, that he examined, peruſed, and approved of the Will as ſo obliterated and altered by his Nephew, in his Preſence, but did not republiſh it in the Preſence of three Witneſſes, but directed his Nephew to have it wrote out fair; but before it was brought back he became delirious; and this was held a good Will as to the Copyhold. 2 Vern. 498. Burkitt *v.* Burkitt.

29. Teſtator gave Inſtructions to make his Will of his Real and Perſonal Eſtate, and when it was brought to him he made ſeveral Alterations, and then wrote the whole over as altered, with his own Hand: This being found in his Study, tho' not ſigned or ſealed, was held a good Will Note, the firſt Sentence was, that he died inteſtate, but that was reverſed by the Delegates. Comyns's Rep. 453. Limbery & *al'* and Hide.

30. A Will of Lands *made before* the Statute of Frauds, had but two Witneſſes, and the Teſtator *died after* the Statute, without altering his Will: And his Honour thought it a good Will, to paſs the Lands; but the other Side inſiſting to have it tried at Law, he directed it accordingly. Prec. in Chan. 77. Serjeant *v.* Puntis.

31. A Witneſs proving a Will of Lands, ſwears that he ſubſcribed the Will, as a Witneſs in the ſame Room, and at the Teſtatrix's Requeſt; two others ſwore, that they ſaw the Will executed by the Teſtatrix, and that they ſubſcribed the ſame in the Teſtatrix's Preſence; a fourth Witneſs was gone beyond Sea, and therefore could not be examined. *Cowper* C. doubted as to the Proof of the Execution of this Will, but would declare no Opinion on the Point until farther Application, ſaying, that the Heir at Law, then an Infant, might by that Time come of Age. Afterwards Lord *Macclesfield* held, that the bare Subſcribing by the Witneſſes in the ſame Room, did not neceſſarily imply it to be in the Teſtator's Preſence, for it might be in a Corner of the Room in a clandeſtine fraudulent Way; and then it would not be a Subſcribing by the Witneſs in the Teſtator's Preſence, merely becauſe in the ſame Room; but that here it being ſworn by the Witneſs, that he ſubſcribed the Will at Teſtatrix's Requeſt, and in the ſame Room; this could not be fraudulent, and was therefore well enough. 1 Will. Rep. 740. Longford *v.* Eyre. The proper Way of examining a Witneſs to prove a Will as to Lands, is that the Witneſs ſhould not only prove the executing the Will by the Teſtator, and his own ſubſcribing it in the Preſence of the Teſtator, but likewiſe that the reſt of the Witneſſes ſubſcribed their Names in the Teſtator's Preſence; and then one Witneſs proves the full Execution of the Will, ſince he proves that the Teſtator executed it; and likewiſe that the three Witneſſes ſubſcribed it in his Preſence. *Per* Lord Chan. *Macclesfield*. Id. 741.

32. It has been determined, that a Truſt of an Inheritance muſt be deviſed in the ſame Manner as a legal Eſtate. Thus where———

33. *J. S.* ſeized of Lands in Fee, conveyed them by Leaſe and Releaſe to Truſtees, to the Uſe of them and their Heirs, in Truſt, (that after ſuch Monies raiſed as therein mentioned) the Truſtees ſhould convey to *A.* his Heirs and Aſſigns, or to ſuch Perſon or Perſons as he or they ſhould direct. 2 Will. Rep. 258. Wagſtaff *v.* Wagſtaff. And his Lordſhip held, that as the Will did not refer to the Deed of Truſt, but *A.* had undertaken to deviſe the Land as Owner thereof, without any Relation had to the pretended Power; this made it much ſtronger againſt the Will. Ibid. 260—It was ſaid *arg.* that this Will, though not good by way of Deviſe, ſhould be ſo by way of Appointment, like a Copyhold ſurrendered to the Uſe of a Will, which may be deviſed by a Will atteſted by two Witneſſes, or one Witneſs only. But his Lordſhip ſaid, that the Copyhold paſſes by a Surrender, and not by the Will, and that if this Matter had not been ſettled, it might be more reaſonable to ſay, when I have ſurrendered my Copyhold to the Uſe of my Will, a Will of this Copyhold ſhall be ſo executed, and in ſuch Manner, as by the Act of Parliament a Will of Lands ought to be executed: But this Caſe having been ruled otherwiſe, he ſaid he would not ſhake it. Ibid. 258.—In Hill. Vac. 1727 his Honour admitted it to be ſettled that where a Copyhold in Fee is ſurren-

Surrendered to the Uſe of a Will, ſuch Will, though executed in the Preſence of one or two Witneſſes only, is good, becauſe it paſſes by the Surrender,

direct. The Monies were raiſed, and *A.* by Will atteſted only by two Witneſſes deviſed the Premiſſes to *B.* Lord Chan. *Macclesfield* ſaid, there could be no Queſtion, but that a Truſt of an Inheritance could not be deviſed otherwiſe than by a Will atteſted by three Witneſſes, in the ſame Manner as a legal Eſtate: For if the Law were otherwiſe, it would introduce the ſame Inconveniences as to Frauds and Perjuries, as were occaſioned before the Statute, by a Deviſe of the legal Eſtate in Fee ſimple. Decreed the Will void, and that the Truſtees ſhould convey the Premiſſes to the Teſtator's Heir at Law.

and not by the Will, which is only a Declaration of the Uſe of a Surrender: But that if a Copyholder be ſeized only of the Truſt or Equity of Redemption of the Copyhold, and deviſes ſuch Truſt or Equity of Redemption, there muſt be three Witneſſes to the Will; for here can be no precedent Surrender to the Uſe of the Will to paſs this Truſt; and the Truſt and Equity of Redemption of all Lands of Inheritance are within the Statute of Frauds, otherwiſe great Inconvenience would ariſe therefrom; and it is no Prejudice to the Lord to comprize the Truſt of a Copyhold within that Statute, becauſe the Perſon who has the legal Eſtate of the Copyhold, is Tenant to the Lord, and liable to anſwer all the Services. Ibid. 261. Anon.——But in the Caſe of *Tuffnel* and *Page*, *Eaſt.* 1720. Lord *Hardwick* was of Opinion that the Truſt of a Copyhold would paſs by a Will not atteſted according to the Statute of Frauds, as a Copyhold ſurrendered to the Uſe of a Will would do; for that Equity ought to follow the Law, and make it at leaſt as eaſy to convey a Truſt, as a legal Intereſt: And decreed according. Ibid. at the Bottom of the P. 261.

Barnard. Rep. in B. R. 367. Durrant *v.* Durrant.

34. Upon an Iſſue directed out of Chancery, wherein the Queſtion was, whether a Man was *compos* or not at the Time of executing the Will, it was held by the Chief Juſtice, that it was not neceſſary that all the Witneſſes to the Will ſhould ſee it executed: If one of them ſaw it executed, and the others were preſent, he ſaid it would be ſufficient.

2 Will. Rep. 236. Whitchurch *v.* Whitchurch. A Will not atteſted, *&c.* as in the preſent Caſe, will be ſufficient to paſs a Term in Groſs; but

35. *J. S.* poſſeſſed of a Term of five hundred Years in *Blackacre*, afterward purchaſes the Fee Simple in *B.*'s Name, and deviſes *Blackacre* by Will, all of his own Hand-writing, to *C.* in Fee; but the Will was neither dated, ſubſcribed, or atteſted. Decreed *per* his Honour, that as this was a Term which would have attended the Inheritance, and in Equity have gone to the Heir, and not to the Executor, in which Reſpect it was to be conſidered as Part of the Inheritance, ſo the Will which was not atteſted by three Witneſſes, as the Law required it to be when Land was to paſs, ſhould not carry this Term.

not a Truſt of a Term attendant on an Inheritance, nor conſequently the Term itſelf. *Per* his Honour Ibid. 238.——A Will not atteſted as the Statute of Frauds requires, ſhall not paſs any Eſtate of which the Heir, as Heir, would otherwiſe have had the Benefit. *Per* his Honour. Ibid.—Gilb. Rep. in Eq. 168. S. C. 2 Mod. Caſes in Law and Equity 124. S. C.

Comyns's Rep. 531. Hands *v.* James.

36. An Ejectment by the Heir at Law, the Queſtion for the Opinion of the Court was, whether it ſhould be left to a Jury to determine, whether the Witneſſes to a Will (being all dead) ſet their Names in the Preſence of the Teſtator, and this merely upon Circumſtances without any poſitive Proof? *Per Cur.* This is a Matter fit to be left to a Jury, which is all that is referred to the Court. The Witneſſes, by the Statute of Frauds, ought to ſet their Names as Witneſſes in the Preſence of the Teſtator; but it is not required by the Statute that this ſhould be taken Notice of in the Subſcription to the Will; and whether inſerted or not it muſt be proved: If inſerted, it does not conclude but it may be proved *contra*, and the Verdict may find *contra*; then if not concluſive when inſerted, the Omiſſion does not conclude it was not ſo, and therefore muſt be proved by the beſt Proof the Nature of the Thing will admit. In caſe the Witneſſes be dead, there cannot probably be any expreſs Proof, ſince at the Execution of Wills, few are preſent but Deviſor and Witneſſes; then, as in other Caſes, the Proof muſt be circumſtantial, and here are Circumſtances. Firſt, three Witneſſes have ſet their Names, and it muſt be intended they did it regularly.—Secondly, one Witneſs was an Attorney of good Character, and may be preſumed to underſtand what ought to be done rather than the contrary. And there may be Circumſtances

cumſtances to induce a Jury to believe, that the Witneſſes ſet their Hands in the Preſence of the Teſtator, rather than the contrary; and it being a Matter of Fact, was proper to be left to them; as whether the Livery was given on a Feoffment, when no Livery is indorſed; whether a Deed was executed when only a Counterpart was produced, &c. and the Court was of Opinion, that the Plaintiff ought to be nonſuited.

37. A Will ſhall not be read in Proof of a Witneſs's Hand, unleſs there be poſitive Proof that he is dead. Comyns's Rep. 614. Biſhop v. Burton.

38. Upon a Trial at Bar concerning the Execution of a Will, it did not appear upon the Face of it, that the Atteſtation of the Witneſſes was made in the Preſence of the Teſtator, which being objected to, a Caſe was cited, where Lord Chief Juſtice *Eyre* held it a Matter proper to be left to a Jury, whether they believed it to be ſo done or not: And Mr. Juſtice *Chappel* cited a Caſe to the ſame Purpoſe, *quod Curia conceſſit*, and held it not neceſſary it ſhould be inſerted in the Will, that the Atteſtation was in the Preſence of the Teſtator, though by the Statute it is neceſſary it ſhould in Fact be ſo atteſted. Vin. Abr. tit. Deviſe (N. 9.) Ca. 4. p. 128. Crofton Dem' of Dalby v. Pawlet.

39. If a Copyholder, after Admittance, ſurrenders the Lands to the Uſe of his Laſt Will, and by his Laſt Will gives them to *A.* but the Will is not atteſted by any Witneſſes; yet *A.* is well intitled to the Lands. *Per* Lord Chanc. Barnard. Rep in Chanc. 11, 12. Tuffnel v. Page.

And his Lordſhip ſaid, that the Reaſon is, that the Party is in by the Surrender, and not by the Will, and therefore it is good, though there be no Witneſſes at all; but that it is neceſſary that the Will be in Writing, and if it be ſo, it is ſufficient, if it be ſigned by the Party; and ſo it is where a Perſon is intitled to the Truſt of a Copyhold, though there were no Surrender at all to the Uſe of the Will, nor the Will atteſted by any Witneſs, yet it is ſufficient to give the Truſt of a Copyhold Eſtate. *Per* his Lordſhip. Id. Ibid.

40. A Surrender was made of a Copyhold Eſtate to Truſtees, to the Uſe of the Will; which was made with only two Witneſſes to it. It was admitted, that a Will of a Copyhold Eſtate does not require three Witneſſes; but this is a Deviſe of a Truſt relating to Lands, ſo within the very Words of the Statute of Frauds: The Heir controverting the Surrender and the Will, this Point was not determined, but two Iſſues ordered. Select Caſes in Chanc. 42. Appleyard v. Wood. Lord Chancellor ſeemed to be of Opinion,

that the Deviſe of a Truſt muſt enſue the Nature of the Eſtate, and not make it neceſſary to have three Witneſſes, as the Copyhold might be deviſed without three Witneſſes; but this may be a Queſtion to be determined when the Iſſues are tried. Ibid.——Vin. Abr. tit. Deviſe. (N. 1.) Ca. 4. p. 129. S. C. ſtates it thus. *A.* ſeized in Fee of Copyhold Lands, makes a Surrender to the Uſe of *B.* and *C.* and their Heirs, to the Uſe of his Will, and deviſes the Land to *D. Parker* C. was of Opinion, that the Circumſtances required by the Stat. 29 *Car.* 2. of Frauds in Deviſes of Lands, ought to be obſerved in this Caſe; for, by this Surrender, the Fee of the Copyhold was in the Surrenderers, and only a Truſt deviſed by the Will, which cannot paſs by the Deviſe, without the Circumſtances required by the Statute of Frauds, in Relation to Deviſes of Lands, be duly obſerved. But the Counſel inſiſting, that a Deviſe of Copyhold is not within the Statute; Lord Chancellor ſaid, that if the Surrender had been only to the Uſe of the Will, that might have been a Queſtion in this Caſe, but now it is not; however he inclined to think it neceſſary in that Caſe, but would not determine that Point, that not being the Caſe before him.

41. Will made beyond Sea, of Lands in *England*, muſt be atteſted by three Witneſſes. 2 Will. Rep. 293.

42. *J. S.* had a Power at any Time during the joint Lives of him and *M.* his Wife, by his Laſt Will, or any Writing purporting to be his Laſt Will, under his Hand and Seal, atteſted by three or more credible Witneſſes) if he ſhould die before his Wife, without any Iſſue between them then 2 Will. Rep. 506. Dormer &c. v. Thurland, &c. Lord Chanc. King ſaid, that though

he himſelf inclined to think the Will of the Lands good, if the Teſtator ſhould acknowledge the Name to be his, and the Witneſſes ſhould ſubſcribe in his Preſence, yet that Point ſhould be reſerved to the Defendant; and ſaid, that he took this Will to be a good one, and being ſo, to be a good Charge; but in the Caſe of *Stonehouſe* and *Evelyn*, in proving a Will diſpoſing of a real Eſtate; the

Proof

Proof was full that the three ſubſcribing Witneſſes did ſubſcribe their Names in the Preſence of the Teſtatrix; but one of them ſaid, he did not ſee the Teſtatrix ſign, but that ſhe owned, at the ſame Time the

then living) to charge Lands with any Sum or Sums of Money not exceeding 2000*l.* to be paid to ſuch Perſons and in ſuch Proportions, as he ſhould appoint; with the like Remainder to *M.* if he ſhould die without Iſſue in the Life of her Huſband *J. S.* There was no Iſſue of the Marriage, and *J. S.* by his laſt Will in Writing under his Hand, atteſted by three Witneſſes, but not ſealed, reciting his Power, *&c.* diſpoſed of 2000*l.* to the Plaintiffs (being his Relations) in the Proportions therein mentioned. There were three Witneſſes to the Will. Two of the Witneſſes ſwore that the Will was ſigned by the Teſtator, in the Preſence of all the three Witneſſes, but the third ſwore, that the Teſtator having Written and ſigned the Will before, called for the Witneſſes, and declared that Writing o be his Laſt Will, and that all the three Witneſſes were then preſent, and ſubſcribed their Names in his Preſence. Lord Chanc. *King* referred it to the Judges of *B. R.* who determined (on Argument) that the Will was void as a Charge for want of being ſealed.

Witneſſes ſubſcribed, that the Name ſigned to the Will was her own Hand-writing, which Sir Joſeph Jekyll held, without all Doubt, to be ſufficient. 3 Will. Rep. 254. And Ibid. the Reporter ſays, that on his mentioning his Honour's Opinion above to Mr. Juſtice Forteſcue Aland, he ſaid, it was the common Practice, and that he had twice or thrice ruled it ſo upon Evidence on the Circuit; and that it is ſufficient if one of the three ſubſcribing Witneſſes ſwears the Teſtator acknowledged the Signing to be his own Hand-writing. And it is remarkable, that the Statute of Frauds does not ſay that the Teſtator ſhall ſign his Will in the Preſence of three Witneſſes, but requires theſe three Things: Firſt, that the Will ſhould be in Writing. Secondly, that it ſhould be ſigned by the Teſtator. And, thirdly, that it ſhould be ſubſcribed by three Witneſſes in the Preſence of the Teſtator.

Vin. Abr. tit. Deviſe, (N. 10.) Ca. 3. p. 128.

43. A Will of Land was duly ſigned by Teſtatrix in the Preſence of *A.* and alſo publiſhed; which *A.* writ the Will, but is now dead: His Hand was proved. After this the Teſtatrix called in *B.* to be a Witneſs to the Will; ſhe told him it was her Will, and publiſhed it as ſuch; after this ſhe called in *C.* and did the ſame. The Queſtion was, whether theſe Witneſſes atteſting this Will at ſeveral Times, though all in the Preſence of the Teſtatrix, was according to the Statute of Frauds and Perjuries? Baron *Price* held it ill *, at *Lent* Aſſizes at *Devon*, 1717.

* For the Intent was, that all the Witneſſes ſhould be together, that one might teſtify for the other; and this was a ready Way to let in Fraud and Perjury, for after the firſt Witneſs had atteſted it, there might be a Razure or Interlineation. *Per* Baron Price. Ibid.

Prec. in Chanc. 185. Cook *v.* Parſons.

44. Lord Keeper *Wright* held a Publication of a Will before three Witneſſes though at three ſeveral Times, good within the Statute, and thought the Writing of the Will with the Teſtator's own Hand, a ſufficient Signing within the Statute, though not ſubſcribed or ſealed by him; but doubted whether owing the Subſcription to be his was ſufficient: But the Validity of the Will is a Queſtion at Law and therefore ordered it to be tried.

Vin. Abr. tit. Deviſe, (N. 2.) Ca. 16. p. 119.

45. If a Man draws up his own Will, and ſends it to Counſel to be adviſed of the Legality of it, this is no Will, unleſs it has a Publication after he receives it back from his Counſel. If after his Will came from Counſel, with Alterations made by Counſel, the Party puts his Seal to it, or ſubſcribes his Name, or writes upon it, This is my Will; though there be no Witneſſes to it, yet this is a good Publication; becauſe any of thoſe declare his Intent, that it ſhould be his Will: And though it had no formal Beginning, but began, Alſo I give and bequeath; and though there be Blanks for the Names of ſuch Perſons as he ſaid he had made a Leaſe or Feoffment to, to perform his Will, if there be ſuch a Leaſe or Feoffment, this is a good Will, and ſhall direct thoſe Perſons, to whom ſuch Leaſe, *&c.* is made, to perform all Things according to the Directions of ſuch Will.

Vin. Abr. tit. Deviſe, (N. 7.) Ca. 13. p. 125.

46. If a Teſtator ſigns his Will, but delivers it as his Act and Deed; yet this will be a ſufficient Publication.

47. An

47. An Uncle having deviſed his Eſtate from his Nephew and Heir at Law, a Younger Brother of the Heir at Law, at the Uncle's Funeral, ſnatched the Will out of the Hands of the Executor, and tore it in many ſmall Pieces, but moſt of them, and particularly ſuch Part wherein was the Deviſe of the Land, were picked up and ſtitched together again: And on a Bill to have the Will eſtabliſhed, it was decreed that the Deviſee ſhould * hold againſt the Heir, and he to convey to him, although there was no direct Proof made that the Heir directed the Tearing of the Will. 2 Vern. 441. Haynes v. Haynes.

* A Will tho' gnawn to Pieces by Rats in the Life of the Deviſor, if by joining the Pieces together, the Contents can be known, will be good. So if a Will continues in Writing at the Death of the Deviſor, though gnawn, burnt, or loſt after, it ſhall ſtand good. Allen 2, 55. A Writing, in Form of an Indenture, and ſealed and delivered, if proved to be intended a Will, ſhall be good as ſuch. 1 Ch. Caſ. 248.——1 Mod. 117.

3. Of the Republication of a Will—What will amount to a Republication.—And, where a Republication will make a Deviſe good.

48. If a Man deviſes certain Lands, and after aliens the Land to a Stranger, and repurchaſes; and after ſhews his Intent, that the ſaid Will ſhall be his Will. This is a new Publication, and the Land ſhall paſs by the Deviſe. 1 Vern. 330. Hall v. Dunch.

49. So the Teſtator's ſaying his Will was in a Box in his Study amounted to a new Publication. 2 Vern. 209. Cotton and Cotton.

1 Freem. 264. ſtates it; *A.* deviſed his Lands in *D.* and all his other Lands unto his Wife, and after purchaſed other Lands, and then diſcourſing with *B*, *B.* deſired him to let him have thoſe new purchaſed Lands at the Rate that he bought them; *A.* anſwered, No; for that he had made his Will, and ſettled his Eſtate, and intended that his Wife ſhould have his whole Eſtate. The Court ſtrongly inclined that this was a new Publication, and applied particularly to the Lands; and that it was no Matter for alledging, *quod dixit Animo Teſtandi*, for that muſt neceſſarily be intended, when the Diſcourſe had particular Reference to the Will——2 Chan. Rep. 138, 140. S. C. ſays, a Trial at Law having been had upon this Point, a ſpecial Verdict was found by C. J. North's Directions; and, on a ſolemn Argument, all the Judges of C. B. held it a Republication of the Will, and that the Lands belonged to the Wife, and that the Court of Chancery affirmed the Judges Opinion.

50. If a Man ſeized of Lands, deviſes all the Lands to *J. S.* and afterwards purchaſes the Manor of *D.* and after writes in his Will that *J D.* ſhall be his Executor: Yet this is not any new Publication, to make the Lands paſs. 1 Roll. Abr. 618.

51. But if after the Purchaſe of the Manor of *D.* he delivers the firſt Will as his Will, and ſays, that it ſhall be his Will, without putting any Words thereto: Yet this is a new Publication to make the Lands newly purchaſed paſs. Id. Ibid. 1 Salk. 237.

52. So if a Man ſeiſed of Lands in *D.* deviſes to another by his Will in Writing, all his Lands in *D.* and after purchaſes other Lands in *D.* and after one *J. S.* comes to him, and requeſts him to give him the Buying of the Lands laſt purchaſed: And he anſwers him, that he will not, but that his Intent was, that thoſe Lands ſhould go to his Executors (the Deviſee being made Executor by the Will) as his other Lands ſhould: And after the Deviſor cauſes a Codicil to be writ, in which there is a Deviſe of ſeveral perſonal Things, as Corn and Implements of Houſhold, and annexes it to his firſt Will: And after dies without other Publication; yet this ſhall be a ſufficient Publication to make the Lands newly purchaſed to paſs by the Will, for there needs no other Words in the Will than there were before; and his Intent appears that it ſhould be his Will, by the annexing the Codicil. 1 Roll. Abr. 618.

53. But

1 Abr. Eq. Caſ. 407. 2 Vern. 722. Hutton v. Simpſon.

53. But if a Man has Iſſue of two Daughters, *A.* and *B.* and he Deviſes Lands to *A.* and to the Heirs of her Body, and for want of Iſſue to *B.* and *A.* dies in the Life-time of the Teſtator, leaving Iſſue, though after the Teſtator annexes a Codicil to his Will, and thereby diſpoſes of ſome Part of his Perſonal Eſtate: Yet this will not amount to a Republication of the Will, nor give any Title to the Iſſue of *A.* though the Teſtator had declared in his Will, that *B.* had married againſt his Conſent, and that what he had given her, was in full of her Portion, and in Bar of any further Part of his real Eſtate.

2 Vern. 209.

54. It has been doubted whether if one deviſes a Leaſe to his Daughter, and afterwards renews the Leaſe, and afterwards adds his Codicil to his Will, without taking any Notice of the Leaſe, whether the Renewal of the Leaſe is a Revocation, and whether the adding a Codicil to his Will is Republication.

MSS. Rep. Gibſon v. Rogers, in Canc. Trin. 23 G. 2.

55. It has been ſaid, however, that if a Codicil be executed after making a Will and purchaſing Lands, it will amount to a Republication, and paſs the Lands purchaſed after making the Will, and that it was ſo determined by all the Judges in the Caſe of *Acherley* and *Vernon*; which ſee *infra*. *Sed Q.* unleſs it appears he had his Real Eſtate under Conſideration.

MSS. Rep. Perkins and Miccle-thwaite.

56. *A.* having given a Legacy *inter alia* to his Son *Joſeph*. *Joſeph* died, and he afterwards had another *Joſeph*, and then by a Codicil to his Will, confirming his Will, he took Notice, that ſince the laſt, it had pleaſed God to give him another Son, and gave him a ſmaller Legacy. Determined, that this was a Republication of his Will, and amounted to a ſubſtituting the ſecond *Joſeph* in the Place of the firſt; and gave him the firſt Legacy as well as the ſecond.

Cro. Eliz. 422. Fuller v. Fuller.

57. If a Man has Iſſue three Sons, *A B.* and *C.* and deviſes Lands to *B.* in Tail, Remainder to *C.* and *B.* has Iſſue two Sons, and dies, and after the Deviſor ſays, My Will is, that the Sons of *B.* ſhall have the Lands deviſed to their Father, as they ſhould have had if he had lived and had died after; and then the Deviſor dies. Whether this ſhould amount to a new Publication, *Dubitatur*: two Judges againſt two.

1 Lev. 243. Strode v. Berager. 1 Vent. 341. 2 Jones 135. Raym. 408.

58. If *J. S.* has Iſſue two Sons, *William* and *Robert*, and *Robert* has Iſſue a Son named *Robert*, and *J. S.* deviſes Lands to his Son *Robert*, and his Heirs; and by the ſame Will gives his Grandſon 50 *l.* and *Robert* his Son dies: And after *J. S.* by Parol republiſhing his Will ſays, *Robert* my Grandſon ſhall take by my Will as *Robert* my Son ſhould have done: Yet the Grandſon ſhall not have the Lands, for Lands cannot paſs but by Will in Writing; and his Son *Robert* cannot import his Grandſon *Robert*, eſpecially when, by the ſame Will, he has made a Diſtinction between Son and Grandſon. The Judgment to the contrary, given by three Judges againſt the Opinion of *Scroggs* in the Common Pleas, is ſaid by the Reporter to have been reverſed in *B. R.* (as he heard) though it was argued, that the Words of the Will were proper enough to paſs the Lands to the Grandſon; for that the Addition of Grand, only imported a Diſtinction between Father and Son while living; but that the Father being dead at the Time of the Republication, the Grandſon might properly be deſcribed by the Name of Son.

Comyns's Rep. 381. Acherley v. Vernon.

59. *J. S.* by a Will dated 17 *Jan.* 1711, deviſed to *M.* his Wife 1000 *l. per Annum* for her Life, to iſſue out of his Real Eſtate, his capital Meſſuage at *H. &c.*; to his Siſter *E.* 200 *l. per Annum* for her Life; and 1000 *l.* to

J. S by Will, dated 25 March 1700, deviſed all his Lands to *A.* his Nephew and his Heirs, and directed, that he ſhould take the Surname of *Lytton*; and his Perſonal Eſtate be deviſed to Dame——— *Ruſſel*, his Siſter, and the ſaid *A.* and made them Executors. Afterward *J. S.* purchaſed the Equity of Redemption of ſome Mortgages in Fee, which were mortgaged to him before he made his Will, and 13 Jan. 1704, by a Codicil atteſted by three Witneſſes, he ſays, "I make this Codicil, which I will ſhall be added to and be Part of my Laſt Will,

to *L.* her Daughter, for her Portion; and after other Legacies, he deviſed the Reſidue of his Real and Perſonal Eſtate to *A. B. C. D.* and *F.* and their Heirs, Executors and Adminiſtrators, on Truſt to veſt the Reſidue of his Perſonal Eſtate in Lands of Inheritance; and that his Truſtees ſhould ſtand ſeized and poſſeſſed of his Real and Perſonal Eſtate to the Uſes of his Will, during his Wife's Life; and after her Deceaſe, if he ſhould die without Iſſue, to the Intent that his Freehold and Leaſehold Eſtate, and the Lands to be purchaſed ſhould be ſettled to the Uſe of the Defendant *G.* for ninety-nine Years. Then to his firſt and other Sons in Tail Male, *&c. J. S.* purchaſed ſeveral Fee-farm Rents, Aſſart Rents, and other Lands and Tenements, and then by a Codicil, 2 *Feb.* 1720, being two Days before his Death, he recites that he made a Will, dated 1ſt *Jan.* 1711, and then ſays, "I hereby ratify and confirm the ſaid Will, except "in the Alterations hereafter mentioned. The Portion to my Niece *L.* "ſhall be made up 6000*l.* and what I have given to my Siſter and "Niece ſhall be accepted by them in Satisfaction of all they may claim "out of my real and perſonal Eſtate, and on Condition they releaſe all "Right, *&c.* to my Executors and Truſtees in my Will named; and "thus having provided for my Siſter and Niece, I deviſe all the Lands "by me purchaſed ſince my Will, to my Truſtees and Executors in my "Will named, to the ſame Uſes, and ſubject to the ſame Truſts to which "I have mentioned to deviſe the Manor of *H.* and the Bulk of my "Eſtate; and I revoke that Part of my Will, whereby I appoint *A. B* "and *C.* three of my Truſtees in my Will, and I deſire *K.* and *N.* to "be two of my Truſtees, and deviſe my ſaid Real Eſtate to them ac-"cordingly." Lord Ch. *Macclesfield*, 20 *Nov.* 1723, decreed, that the Will was confirmed by the Codicil; that *J. S.* ſigning and publiſhing his Codicil in the Preſence of three Witneſſes was a Republication of his Will, and both together made but one Will; and by the ſaid Will and Codicil, his Fee-farm Rents, Aſſart Rents and Lands, contracted to be purchaſed, and all his Real and Perſonal Eſtate (except the Copyhold purchaſed before his Will) did well paſs. On Appeal to the Lords, the Decree was affirmed.

"which I have formerly made." And Lord Ch. Cowper, aſſiſted by Sir John Trevor Maſter of the Rolls, and Lord Ch. J. Trevor and Tracey J. 16 June 1708. decreed, that this was not a Republication. For ſince the Stat. 29 Car. 2. there can be no Deviſe of Lands by an implied Republication; for the Paper in which a Deviſe of Lands is contained, ought to be re-executed in the Preſence of three Witneſſes. Cited arg' in the Caſe of Acherley *v.* Vernon, as the Caſe of Lytton *v.* Viſcounteſs Falkland. Vid. Comyns's Rep. 383.——*A.* by Will, dated 11 Oct. 1684, only executed, took Notice that his Lands were ſettled upon his Sons *B.* and *C.* in Tail Male, and then deviſed in theſe Words: "In Caſe my Sons ſhall have no Iſſue Male, then for the Preſervation of my Name and "Family, I deviſe my ſaid Lands to my Brother *G.* and the Heirs Male of his Body iſſuing." *G.* died in the Life of the Teſtator having Iſſue a Son, then Lord Landſdown, by which the Deviſe to *G.* in Tail Male lapſed. Aug. 15. 1701, the Teſtator ſent for ſeven Perſons, and ſaid, "I ſent for you to "be Witneſſes to my Will, and ſometimes to be Witneſſes to the Republication of my Will;" and then took a Codicil, dated ſame Day, in one Hand, and the Will in the other, and ſaid, "This is "my Will whereby I have ſettled my Eſtate, and I publiſh this Codicil as Part thereof;" and then ſigned the Codicil which lay on the Table with the Will, in the Preſence of the Witneſſes, who ſubſcribed it in his Preſence. By this Codicil he deviſed in theſe Words; "Whereas I heretofore made "my Will, dated 11 Oct. 1684, which I do not Intend wholly to revoke; but in regard to the many "Accidents and Alterations in my Family and Eſtate, I by this Codicil, which I appoint to be taken "as Part of my Will, deviſe as follows;" and then deviſed ſeveral Manors, &c. to his Son *B.* in Fee, and 100*l. per Annum* to his Nephew, then Lord Landſdown, for Life. He then put the Will and Codicil together in a Sheet of Paper, and ſealed them up in the Preſence of the ſame Witneſſes: But the Will was not unfolded in their Preſence, nor did any of them write their Names as Witneſſes on or under the Will, or on the ſame Paper; but on the Codicil only. And Parker Ch. J. and the whole Court held this no Republication. For ſince the Stat. 29 Car. 2. there ſhall be no Republication by Implication; but the Will muſt be re-executed, otherwiſe a Deviſe of Lands ſhall not be good. Comyns's Rep. 384. Vid. Lucas's Rep. 96.——Since the 29 Car. 2. the ſame Forms are neceſſary to the republiſhing a Will as to the firſt making it. Reſolved *per* Lord Ch. Cowper, Trevor, Ch. J. and Tracy J. Vid. Lucas's Rep. 98.

60. It was determined upon the Opinion of all the Judges, that if a Will be made, and afterwards another Will without cancelling the former; and then by an Act ſubſequent to both, the firſt will be confirmed, the Limitations in that Will ſo confirmed, will take Place: And alſo that if there

MS. Rep. Phipps *v.* Angleſey in Dom. Proc. June 1751.

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are two inconſiſtent Wills of the ſame Date, neither of which can be proved to be laſt executed; they are both void by the Common Law for Uncertainty, and will let in the Heir at Law: And alſo that although the Wills are dated the ſame Day, the Limitations may take place if they are conſiſtent in both, to the Diſinheriſon of the Heir at Law: and upon this Opinion, the Order appealed from, which was a Diſmiſſion of the Plaintiff's Bill in the Court of the Exchequer in *Ireland*, was confirmed in Favour of Lord *Angleſey*, by the Houſe of Lords. *Vide* the printed Copy.

2. What ſhall be deemed a good Will in Writing of Goods and Chattels.

Shep. Abr. 54. Voc. Teſt'.

61. If it be a Will of Goods and Chattels, and be compleat, there muſt be an Executor named in it, and that Executor that is named muſt be capable of the Executorſhip; for this is the principal Thing in it. And be there never ſo many Legacies given, and no Executor made, this Will is but a Codicil, and cannot be properly called a Teſtament; for here the Party dies Inteſtate, and an Adminiſtration of the Goods muſt be granted: But where there is an Executor, although there be no Legacy given, yet it is properly ſaid to be a Teſtament.

See Title *Executors* and *Adminiſtrators* and *Legacies*.

3. What ſhall be ſufficient Proof of a Will.

Swinb. Part 4. ſec. 28. and Part 7. ſec 13. N. B. The Law, in theſe Particulars, with reſpect to Wills of *Lands*, &c is altered by 29 Car. 2. c. 3. before taken Notice of, whichmakes it neceſſary for the Will to be ſubſcribed by the Teſtator, or ſome one in his Preſence, and to be ſubſcribed in his Preſence by three Witneſſes.

62. A written Will, when it is written with the Teſtator's own Hand, proves itſelf, and therefore needs not the Help of Witneſſes to prove it; and for this Cauſe, if a Man's Will be found written fair and perfect, with his own Hand, after his Death, although it be not ſubſcribed with his Name, ſealed with his Seal, or have any Witneſſes to it, if it be known or can be proved to be his Hand, it is held to be a good Teſtament, and a ſufficient Proof of itſelf; but if it be ſealed with his Seal, and ſubſcribed with the Name of the Teſtator, and can be proved by Witneſſes, it is the more authentick; and when it is found amongſt the choiceſt Evidence of the Teſtator, or faſt locked up in a ſafe Place, it is the more eſteemed; for if it be written in another Hand, and the Teſtator's Hand and Seal, or one of them, not to it, although it be found in ſuch a Place as before, yet ſome Proof will be expected of it further by Witneſſes in that Caſe; and if Writing be found under the Teſtator's own Hand, yet if it be but a ſcribbling Writing, written copywiſe, with a great Diſtance between every Line, without any Date, in ſtrange Characters, with many Interlineations, and lying amongſt his void Papers, or the like: This will not be eſteemed a ſufficient Will, nor a good Proof of it, but it ſhall be accounted rather a Draught or Image of the Teſtator's Will, for a Direction to him after to make his Will by; and yet if it can be proved that the Teſtator did declare himſelf, that this ſhould be his Will, this will be a good Will, and a good Proof of it.

Id. Ibid.

63. If it be proved, that the Teſtator ſaid his Teſtament was in ſuch a Schedule, in the Hands of *J. S.* and *J. S* produces a Writing, depoſing it to be the ſame, this is the ſufficient Proof: But if he ſays withal, it is written with his own Hand, then it ſeems ſome other Proof, as by comparing Hands, or the like, that it is his Hand wherein it is written, will be expected.

Id. Ibid.

64. If the Witneſſes will prove the Writing produced to be the Laſt Will of the Teſtator, or that he ſaid it was, or it ſhould be his Laſt Will, or that it was the ſame Writing that was ſhewed to them, and whereunto they

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are Witneſſes; although they never heard it read, or ſet their Hands to it, it is a ſufficient Proof.

65. Where there is no Queſtion or Oppoſition moved or had about or againſt a Will, there the Oath of the Executor alone is eſteemed a ſufficient Proof of it, and in that Caſe regularly no other Proof is required; and where more Proof is neceſſary, it is in the Diſcretion of the Ordinary what Proof to admit and allow: And thoſe Witneſſes, for Number, Nature and Quality, or ſuch other Proof that he deems and accepts for ſufficient, is ſufficient; and the Will ſo proved by ſuch Witneſſes, or ſuch other Proof, is ſufficiently proved.

66. All Perſons, male and female, rich and poor, are eſteemed competent Witneſſes to prove a Will, ſave only ſuch as are infamous, as perjured Perſons, and the like; and ſuch as want Underſtanding and Judgment, as Children, Infants, and the like; and ſuch as are preſumed to bear Affection, as Kindred, Tenants, Servants, and the like. A Legatee is reputed a competent Witneſs to prove any other Part of the Will but his own Legacy, or to prove any Thing againſt himſelf touching his own Legacy, but not otherwiſe; and therefore where there are two Witneſſes of a Will, wherein either of them have ſomewhat bequeathed unto himſelf, this Will cannot be ſufficiently proved for thoſe Legacies, but for the reſt of the Will it may be ſufficiently proved. But ſee *poſtea*. Swinb. Part 4. ſec. 24.

67. Where a Teſtator by his Will deviſed Lands, and gave to the Wife of *John Hailes* an Annuity of 20 *l.* a Year to her ſole and ſeparate Uſe; and to *J. Hailes* and his Wife each of them a Legacy of 10 *l.* and charged his whole Real and Perſonal Eſtate with the Payment of all his Legacies and Annuity. *J. Hailes* was one of the ſubſcribing Witneſſes to this Will. The Legacies and Satisfaction for the Annuity were tendered and refuſed; and the Queſtion now was on a ſpecial Verdict, whether this Will was good and well atteſted within the Statute of Frauds and Perjuries? The Court were of Opinion, that the Will was not properly atteſted, as *Hailes* was intereſted, and therefore not a credible Witneſs; and gave Judgment for the Plaintiff the Teſtator's Heir at Law. MSS. Rep. Anſty *v.* Dowſing, Mich. 1744. B. R.

68. Witneſſes have been examined to prove the Teſtator's Intent. 2 Ld. Raym. 1326. Cliffe & *al' v.* Gibbins & *al.*

69. The Probate of a Will cannot be controverted at Common Law. 1 Ld. Raym. 262. Sir Richard Raine's Caſe. *N. B.* Though neither the Courts of Law, nor the Courts of Equity can determine the Validity of a Probate adverſarily; yet if it comes in incidentally, and the incident is admitted by the Parties, thoſe Courts may determine it, and hold the Parties bound by their Admiſſion. Atk. 630. Sheffield *v.* The Ducheſs of Buckingham.

70. A Recital of a Will in a Copyhold Admittance is Evidence againſt any but the Heir. Id. 735.

71. *Q.* If the Probate or Regiſter of a Will be Evidence to prove a Pedigree. Id. 745.

72. According to *Holt* Ch. J. the Regiſter's Book is good Evidence to prove a Will concerning Lands. 1 Ld. Raym. 731. St. Leger *v.* Adams.

73. One of the ſubſcribing Witneſſes to the Atteſtation of a Will having an Annuity deviſed to his Wife, was held not to be a credible Witneſs within the Statute. 2 Str. 1253. Holdfaſt on Dem' of Anſty *v.* Dowſing.

74. Parol Evidence is not admitted to contradict the Words of a Will. Id. 1261. Lowfield *v.* Stoneham, & Caſ. Temp. Talbot, Brown *v.* Selwin, 240.

75. And Proof of a Will cannot be made againſt a Man by Confeſſion of his own Witneſs. 1 Ld. Raym. 730 Pyke *v.* Crouch.

Id. 847. Edgworth v. Smalridge. 76. Executor may be ſued for a Legacy where he proves the Will, though he does not live in that Dioceſe.

77. But Deviſees, Legatees, and Creditors, are now made competent Witneſſes to Wills. Therefore we are next to ſhew———

1. In what Caſes Deviſees, Legatees, and Creditors may be admitted to prove a Will.

78. "By the Act of 25 *Geo.* 2. for avoiding and putting an End to certain Doubts and Queſtions, relating to the Atteſtation of Wills and Codicils, concerning Real Eſtates, in that Part of *Great Britain* called *England*, and in his Majeſty's Colonies and Plantations in *America*, it is enacted, That any Perſon ſhall atteſt the Execution of any Will or Codicil, which ſhall be made after the 24th *June* 1752, to whom any beneficial Deviſe, Legacy, Eſtate, Intereſt, Gift or Appointment of, or affecting any Real or Perſonal Eſtate, other than and except Charges on Lands, Tenements or Hereditaments, for Payment of any Debt or Debts, ſhall be thereby given or made, ſuch Deviſe, &c. or Appointment, ſhall ſo far only as concerns ſuch Perſons atteſting the Execution of ſuch Will or Codicil, or any Perſon claiming under him, be utterly null and void; and ſuch Perſon ſhall be admitted as a Witneſs to the Execution of ſuch Will or Codicil, within the Intent of the Act of 29 *Car.* 2. notwithſtanding ſuch Deviſe, &c.

79. "And it is alſo enacted, that in Caſe by any Will or Codicil made or to be made, any Lands, Tenements, or Hereditaments, are or ſhall be charged with Debt; and any Creditor whoſe Debt is ſo charged, hath atteſted, or ſhall atteſt, the Execution of ſuch Will or Codicil. ſuch Creditor ſhall be admitted as a Witneſs to the Execution of ſuch Will or Codicil, within the Intent of the ſaid Act. That if any Perſon hath atteſted the Execution of any Will already made, or ſhall atteſt the Execution of any Will, &c. made on or before 24th *June* 1752, to whom any Legacy is or ſhall be thereby given, whether charged upon Lands, Tenements or Hereditaments, or not; and ſuch Perſon before he ſhall give his Teſtimony concerning the Execution of ſuch Will, &c. ſhall have been paid, or have accepted or releaſed, or ſhall have refuſed to accept ſuch Legacy or Bequeſt, upon Tender made thereof; ſuch Perſon ſhall be admitted as a Witneſs to the Execution of ſuch Will, &c. within the Intent of the ſaid Act. Provided that in Caſe of Tender and Refuſal, ſuch Legatee ſhall in no wiſe be intitled to ſuch Legacy, but ſhall be barred from his Legacy; and in Caſe of Acceptance, ſuch Legatee ſhall retain his Legacy, which ſhall have been ſo paid, ſatisfied, or accepted, notwithſtanding ſuch Will or Codicil ſhall afterward be adjudged to be void. That in Caſe a Legatee, &c. who hath atteſted the Execution already made, or which ſhall be made on or before 24 *June* 1752, ſhall die in the Teſtator's Life-time, or before he ſhall have received or releaſed or refuſed (on tender) his Legacy, ſuch Legatee ſhall be a legal Witneſs to the Execution of ſuch Will, &c. within the Intent of the ſaid Act of 29 *Car.* 2. Proviſo, that the Credit of every ſuch Witneſs ſo atteſting, &c. and all Circumſtances relating thereto ſhall be ſubject to the Conſideration and Determination of the Court and the Jury before whom any ſuch Witneſs ſhall be examined, or his Teſtimony or Atteſtation made uſe of; or of the Court of Equity in which his Teſtimony or Atteſtation ſhall be made uſe of; in like Manner as the Credit of Witneſſes in other Caſes, ought to be conſidered of and determined. No Perſon to whom any beneficial Eſtate, Intereſt, Gift, or Appointment, ſhall be given or made, which is thereby enacted to be null and void, or who ſhall have

"refuſed

"refuſed to receive any ſuch Legacy or Tender as aforeſaid; and who "ſhall have been examined as a Witneſs concerning the Execution of ſuch "Will or Codicil, ſhall, after he ſhall have been ſo examined, demand or "take Poſſeſſion of, or receive, any Profit or Benefit of or from any ſuch "Eſtate, &c. given by any ſuch Will or Codicil; or demand, receive or "accept from any Perſon, any ſuch Legacy or Bequeſt, or any Satisfac- "tion or Compenſation for the ſame, in any Manner, or under any Colour, "or Pretence whatſoever. This Act not to extend to the Caſe of any Heir "at Law, or of any Deviſee in a prior Will or Codicil of the ſame Teſta- "tor, executed and atteſted according to the Act of 29 *Car.* 2. or any "Perſon claiming under them reſpectively, who has been in quiet Poſſeſ- "ſion for two Years next proceeding the 6th of *May* 1751; as to ſuch "Lands, Tenements, or Hereditaments, whereof he has been in quiet Poſ- "ſeſſion as aforeſaid. This Act not to extend to any Will or Codicil, the "Validity or due Execution whereof hath been conteſted in Law or Equity "by the Heir of ſuch Deviſor, or the Deviſee in any ſuch prior Will, or "Will or Codicil ſo conteſted, or any Part thereof, or for obtaining any "Codicil, for recovering the Lands, &c. mentioned to be deviſed in any "other Judgment or Decree relative thereto, on or before the ſaid 6th of "*May* 1751, and which has been already determined in Favour of ſuch "Heir at Law, or Deviſee in ſuch prior Will or Codicil, or any Perſon "claiming under them reſpectively or which is ſtill depending, and has "been proſecuted with due Diligence; but the Validity of every ſuch Will "or Codicil and the Competency of the Witneſſes thereto, ſhall be ad- "judged and determined in the ſame Manner as if this Act had never been "made. No Poſſeſſion of any Heir at Law, or Deviſee in ſuch prior Will "or Codicil, as aforeſaid, or of any Perſon claiming under them reſpec- "tively, which is conſiſtent with, or may be warranted by or under any "Will or Codicil atteſted according to the Intent of this Act, or where the "Eſtate deſcended or might have deſcended to ſuch Heir at Law, till a "future or executory Deviſe by Virtue of any Will or Codicil atteſted ac- "cording to this Act, ſhould or might take Effect, ſhall be deemed to be "a Poſſeſſion within the Intent of the Clauſe herein laſt contained. This "Act ſhall extend to ſuch of the *Britiſh* Colonies in *America*, where the "29 *Car.* 2. is by Act of Aſſembly made, or by Uſage received as Law; "or where by Act of Aſſembly or Uſage, the Atteſtation and Subſcription "of a Witneſs or Witneſſes, are made neceſſary to Deviſes of Lands, &c. "and ſhall have the ſame Force and Effect in the Conſtruction of, or for "the avoiding of Doubts upon the ſaid Acts of Aſſembly, and Laws of "the ſaid Colonies, as the ſame ought to have in the Conſtruction of, or "for the avoiding Doubts upon, the ſaid Act in *England*. Provided, al- "ways, that as to the Caſes ariſing in any of the ſaid Colonies, no ſuch "Deviſe, Legacy, or Bequeſt aforeſaid, ſhall be made null and void by "virtue of this Act, unleſs the Will or Codicil whereby ſuch Deviſe, &c. "ſhall be given, ſhall be made after *March* 1, 1753."

2. What the Law is where the Probate differs from the original Will.

80. A Will was made in *French* and proved in *French*, and under it in the ſame Probate, the Will was tranſlated into *Engliſh*, but it appeared to be falſely tranſlated. It was objected, that the Tranſlation being Part of the Probate, and allowed in the Spiritual Court, it muſt bind; and the Application muſt be to that Court to correct the Miſtakes, which until then muſt be concluſive. But *per* his Honour, nothing but the Original is Part of the Probate; neither hath the Spiritual Court Power to make any Tranſlation: And ſuppoſing the original Will was in *Latin* (as was formerly 1 Will. Rep. 526. L'Fitt v. L'Batt.

merly very uſual) and there ſhould be a plain Miſtake in the Tranſlation of the *Latin* into *Engliſh*, ſurely the Court would determine according to what the Tranſlation ought to be. And ſo it was done in this Caſe.

2. Of Nuncupative Wills.

81. "By *Stat.* 29 *Car.* 2. *c.* 3. *ſ.* 19. for the Prevention of fraudulent "Practices it is enacted, 1. That no Nuncupative Will ſhall be good where "the Eſtate thereby bequeathed ſhall exceed the Value of thirty Pounds, "that is not proved by the Oaths of three Witneſſes, at the leaſt, that "were preſent at the making thereof, and bid by the Teſtator to bear Wit- "neſs that ſuch was his Will, or to that Effect. *And by Stat.* 4 *Ann. c.* 16. "*ſ.* 14. *it is declared, That all ſuch Witneſſes as are and ought to be al-* "*lowed to be good Witneſſes upon Trial at Law, by the Laws and Cuſtom* "*of this Realm, ſhall be deemed good Witneſſes to prove any Nuncupative* "*Will, or any Thing relating thereto.*

82. "Nor unleſs ſuch Nuncupative Will were made in the Time of the "laſt Sickneſs of the Deceaſed, and in the Houſe of her or their Habitation "or Dwelling, or where he or ſhe has been reſident for ten Days, or more "next before the making of ſuch Will, except where ſuch Perſon was "ſurpriſed or taken ſick, being from his own Home, and died before he "returned to the Place of his or her Dwelling.

83. "*Sec.* 20. That after ſix Months paſſed after the ſpeaking of the "pretended Teſtamentary Words, no Teſtimony ſhall be received to prove "any Will Nuncupative, except the ſaid Teſtimony, or the Subſtance "thereof were committed to Writing within ſix Days after the making of "the ſaid Will.

84. "*Sec.* 21. That no Letters Teſtamentary, or Probate of any Nun- "cupative Will, ſhall paſs the Seal of any Court, till fourteen Days, at the "leaſt, after the Deceaſe of the Teſtator be fully expired, nor ſhall any "Nuncupative Will be at any Time received to be proved, unleſs Proceſs "have firſt iſſued to call in the Widow, or the next of Kindred to the De- "ceaſed, to the End they may conteſt the ſame, if they pleaſe.

85. "*Sect.* 22. That no Will in Writing concerning any Goods or Chat- "tels, or Perſonal Eſtate, ſhall be repealed; nor ſhall any Clauſe, Deviſe, "or Bequeſt therein, be altered or changed by any Words, or Will by "Word of Mouth only, except the ſame be in the Life of the Teſtator "committed to Writing, and after the Writing thereof read to the Teſta- "tor, and allowed by him, and proved to be ſo done by three Witneſſes "at the leaſt.

86. "*Sec.* 23. Provided that any Soldier in actual Military Service, or any "Mariner or Seaman being at Sea, may diſpoſe of his Moveables, Wages, "and Perſonal Eſtates, as before the making of this Act."

N. B. It has been ruled in Equity, that before Probate, a Nuncupative Will is not pleadable in any Court againſt any Adminiſtrator. 1 Ch. Caſ. 192. Verhorne *v.* Brewin

1 Abr. Eq. Caſ. 403.

87. *A.* being ill, deſired *B.* to make her Will, who wrote down only Names and initial Letters to this Effect, *viz.* To *Tho. Weſt* 200*l.* to *Jo. Dev.* 100*l.* to *Reb. Cro.* 50*l.* to Self 10*l.* and to ſeveral other Perſons in like Manner, to above 400*l.* which being more than her Eſtate, *B.* made an Alteration in the ſecond Column, by ſubtracting Part of the Sums from ſome of the Legatees, as ſet down in the ſecond Column, and then told *A.* the Senſe of the propoſed Deviſes: There were two Perſons in the Room that did not hear any Thing that paſſed between *A.* and *B.* but only heard the Teſtatrix at laſt pronounce, that all was well. *B.* went to a Scrivener to have the Deviſes drawn out at Length and in Form, and before ſhe returned the Teſtatrix died: The Judge below pronounced for this Will; but upon Appeal to the Delegates, it was reverſed; and in this Caſe

Caſe it was agreed, that if the Will had been written in Words at Length, ſo as they had carried a Senſe and Meaning in themſelves, it had been a good Will; for that there was one Witneſs that wrote it, and two that heard the Teſtatrix pronounce, that it was well: Which would have been intended to have amounted to a ſecond Witneſs, in Regard it appeared on all Hands, by ſeveral Witneſſes, that the Teſtatrix did then ſeriouſly diſpoſe herſelf to make her Will; and for that was quoted the Caſe of one *Pepper*, where a Perſon diſpoſed herſelf to make her Will, and dictated it to a Perſon who wrote it down; and another, not called in as a Witneſs, lay behind the Hangings, out of Curioſity; and yet ſuch Will was allowed to be good, being proved by theſe two Witneſſes: But they diſtinguiſhed this Caſe, becauſe the Will was not ſubſtantive, but was to take its Senſe from the Interpretation of the Witneſs; and ſo there would be *Innuendo* upon *Innuendo*, which made purely a Nuncupative Will: And as ſuch, not being atteſted by the Number of Witneſſes appointed by the Statute of Frauds and Perjuries, the Will and Legacies were void.

88. Dr. *Shallmer*, by Will in Writing, gave 200*l.* to the Pariſh of St. *Clement's Danes*, and after, *Prew* the Reader coming to pray with him, his Wife put him in Mind to give 200*l.* more towards the Charges of building their Church, at which, though Dr. *Shallmer* was at firſt diſturbed, yet after he ſaid he would give it, and bid *Prew* take Notice of it: And the next Day he bid *Prew* remember of what he had ſaid to him the Day before, and died that Day. Within three or four Days after the Doctor's Wife puts down a Memorandum in Writing of the ſaid laſt Deviſe, and ſo did her Maid. *Prew* died about a Month after, and amongſt his Papers was found a Memorandum of his own Writing, dated three Weeks after the Doctor's Death, of what the Doctor ſaid to him about the 200*l.* and purporting that he had put it in Writing the ſame Day it was ſpoken: But that Writing which was mentioned to be made the ſame Day it was ſpoken did not appear, and theſe three Memorandums did not expreſsly agree. About a Year after, on Application by the Pariſh to the Commiſſioners of Charitable Uſes, and producing theſe Memorandums and Proof by Mrs. *Shallmer* and her Maid, they decreed the 200*l.* But on Exceptions taken by the Executors, the Decree was diſcharged of this 200*l.* and Lord Chancellor held it not good, becauſe it was not proved by the Oath of three Witneſſes; for though Mrs. *Shallmer* and her Maid had made Proof, yet *Prew* was dead; and the Statute in that Branch requires not only three to be preſent, but that the Proof ſhall be by the Oath of three Witneſſes. 1 Abr. Eq. Caſ. 404.

89. A Daughter depoſits 180*l.* in the Hands of her Mother (the Defendant) and afterwards makes her Will in Writing, and thereby deviſes ſeveral Legacies, and makes her Mother Executrix, but takes no manner of Notice of this 180*l.* Afterwards, by Word of Mouth, ſhe deſires her Mother to give this 180*l.* to the Plaintiff, if ſhe thought fit, and then ſoon after died: The Mother proved the Will, and this Bill was brought againſt her, to have the 180*l.* paid. The Mother, by her Anſwer, admits ſhe had ſuch a Sum in her Hands, that her Daughter did make ſuch a Requeſt to her, but that ſhe left it to her Election, whether ſhe would give it to the Plaintiff or not, by the very Form of the Deviſe: And inſiſted, that ſhe did not think fit to give it to the Plaintiff. And in this Caſe it was agreed, that this was not good as a Nuncupative Will, being above 30*l.* and not reduced into Writing within ſix Days after the ſpeaking, as the Statute requires. 2dly, That if the Defendant had inſiſted on the Statute of Fraud and Perjuries, the Court could not have relieved the Plaintiff as upon a Truſt: But in this Caſe the Defendant having by Anſwer confeſſed the Truſt, there was no Danger of Perjury from Variety of Proof, which was the Miſchief the Statute intended to provide againſt; and therefore the Court took it to be in Nature of a Truſt, and decreed for Id. Ibid. Gil. Eq. Rep. 146. Jones v. Nabbs.

for the Plaintiff: For the Defendant expreſsly ſwore, ſhe did not think fit to give it to the Plaintiff, and that the Teſtatrix had left her at Liberty. But this Decree was againſt the Opinion of ſeveral at the Bar, who thought it too hard on the Election left in the Mother: But the Court principally relied on the Caſe of *Kingſman* and *Kingſman*, where a Man deviſed away an Eſtate of 2000*l. per Ann.* and upwards, from his Son and Heir to a Bargeman. And by his Will deviſed 20*l. per Ann.* to his Son, with this Clauſe, that if he behaved himſelf well, and gave no Trouble or Diſturbance concerning his Will, that he might make it up 80*l.* if he thought fit. And the Court decreed the 80*l. per Ann.* to the Son. But note, the 80*l. per Ann.* in the Caſe of *Kingſman* and *Kingſman* ſeems to have been decreed purely upon the Circumſtances and Hardſhips of the Caſe: But in the preſent Caſe there were no ſuch Circumſtances or Ingredients of Hardſhip on the Plaintiff: But *Quære*, for it ſeems to be a Truſt in the Hands of the Mother.

(E) The Nature and Effect of a Will or Teſtament and of a Codicil.

1 Inſt. 112. 4 Rep. 61. b. Forſe and Hembling's Caſe.

1. A Will or Teſtament is of that Nature, that it differs much from other Acts and Deeds that Men do and execute in their Life-time: For although it be made, ſealed, and publiſhed in ever ſo ſolemn a Manner, yet it has no Life nor Virtue in it until the Teſtator's Death: For it is a Maxim in Law, *Omne Teſtamentum Morte conſummatum eſt, & Voluntas eſt ambulatoria uſque ad Extremum Vitæ Exitum*, it is therefore reſembled until Death to the interlocutory Sentence, and after Death to the definitive Sentence of a Judge; and hence it is ſaid, *Sed Legum ſervanda Fides, ſuprema Voluntas Quod mandat fierique jubet parere neceſſe eſt.*

But N. B. though it does not take Effect till after the Teſtator's Death, yet it is inchoate, though not conſummate, from the Execution of it; and to many Purpoſes in Law ſhall relate to the Time of the making of it. 1 P. Will. 97. Lord Bindon *v.* Earl of Suffolk.

Shep. Abr. Part 4. p. 9. Voc. Teſt.

2. And for this Reaſon a Man may alter or make void his Will at his Pleaſure; and he may make as many new Wills and Teſtaments as he pleaſes, and there is no Way to bar a Man of this Liberty.

Lit. 168. Swinb. P. 1. ſec. 5. Br. Teſtament 20.

3. And the latter Teſtament always revokes and overthrows the former: But otherwiſe it is of a Codicil, for a Man may make as many of theſe as he will, and make no Teſtament at all. Or if he makes a Teſtament, he may afterwards make as many Codicils as he will, and one of them will not overthrow the other; for in the firſt Caſe they muſt be all annexed to the Letters of Adminiſtration, and the Adminiſtrator muſt perform them; and in the latter Caſe they muſt be all annexed to the Teſtament, and the Executor muſt take Care to perform them.

Shep. Abr. Part 4. pl 9. Voc. Teſt.

4. A Teſtament therefore is ſaid to have three Degrees. 1ſt, An Inception, which is the making of it. 2dly, A Progreſſion, which is the Publication of it. 3dly, A Conſummation, which is the Death of the Teſtator.

1 Inſt. 112. b.

5. In Grants therefore the firſt is of the greateſt Force, but in Teſtaments the laſt is of greateſt Force.

But if the latter Will cannot be found, or the Contents of it are unknown, it is no Revocation of the Former. Show. Caſ. in Par. 146.

6. But

6. But when a Teſtament is perfect by the Death of the Party, it as effectually gives and transfers Eſtates, and alters the Property of Lands and Goods, as Acts executed by Deeds in the Life-time of the Parties: For hereby Deſcents of Lands are prevented. And a Man may make Eſtates in Fee-Simple or Fee-Tail, for Life or Years, of Lands, Tenements, Rents, Reverſions, or Services, as effectually as by Deed; and theſe Eſtates alſo will be good without any Livery of Seiſin or Attornment, and hereby alſo Rents and Power to diſtrain for them, may be reſerved, Conditions created and annexed to Eſtates or Things deviſed. Shep. Abr. Part 4. p. 10. Voc. Teſt'.

7. And therefore they that take by Deviſes of Land, are ſaid to take in the Nature of Purchaſers.

8. And if therefore a Tenant in Tail makes a Feoffment to the Uſe of himſelf in Fee, and after deviſes the ſame Land to his Wife in Fee, and dies, the Son is not remitted though the Father dies ſeized, for the Deviſe prevents the Deſcent. Dy. 221. pl. 16.

(F) How Wills ſhall be conſtrued.

1. IT is to be obſerved, that where the Words of a Will have a plain Senſe, and no Doubt is in any Matter within or without the Words, touching the Matter of the Deviſe, there the Words of the Will ſhall always be taken to be the Intent of the Deviſor, and his Intent to be what the Words ſay. 2 And. 17. Lowen v. Bedd.

2. That all the Words of a Will are to be carried to anſwer the Intent of the Deviſor; but this is to be underſtood in Caſes where the Intent of the Party may be known by the Words that are in the Will. 2 And. 10, 11, 134.

3. That if there are inconſiſtent and contradictory Words in a Will, ſome Words muſt be rejected to make it Senſe. Thus where a Teſtator gave the Intereſt of a Sum of 6000*l.* to *Mary Comfortle*, his Daughter, for her Life, and after Deceaſe gave the Money between *Charles Comfortle* her Huſband, and their Children: And in another Part of the Will he ſaid, and in Caſe there be no ſuch Child or Children, I give it to *Charles Comfortle* and ſuch Children.——Lord Chanc. rejected theſe latter Words, as they were abſurd and contradictory. MSS. Rep. Boon v. Comfortle, Paſ. 24. G. 2. in Canc.

4. *A.* having a Wife and no Children, made his Will, and ſaid,—leaſt it ſhould pleaſe God that he ſhould not return, he gave and deviſed a Real and Perſonal Eſtate, or to that Effect. He returns, has Children, and dies, without altering his Will: The Plaintiff being a Legatee, and there being a Direction in the Will, for the Sale of the Real Eſtate to pay his Legacy; Lord Chanc. was of Opinion, that the Diſpoſition was merely contingent, and that no Part of the Will, was to take Effect but on the Contingency of his Return; and ſo avoided determining the principal Queſtion, how far the Alteration of the Teſtator's Circumſtances would be a preſumptive Revocation as to the Real and Perſonal Eſtate; but as to the Perſonalty, ſeemed to rely on the Caſe of *Lug* and *Lug*; and as to the Real Eſtate, he ſaid, that the Statute of Frauds and Perjuries made a material Difference between that and the Perſonal Eſtate. MSS. Rep. Parſons v. Lenow, Hill. 22 G. 2. in Canc.

5. That a Will muſt have a favourable Interpretation, and as near to the Mind and Intent of the Teſtator as may be, and yet ſo withal as his Intent may ſtand with the Rules of Law, and not be repugnant thereunto: it being a Rule or Maxim of Law, *Quod ultima Voluntas Teſtatoris perimplenda eſt, ſecundum veram Intentionem*; and that, *Sed Legum ſervanda Fides*, Shep. Abr. Part 10. Voc. Teſtament.

Bridg. 105. Standiſh v. Short. *Fides, ſuprema Voluntas Quod mandat fierique jubet parere neceſſe eſt.* In Deeds the Rule of Conſtruction is, That the Intention muſt be directed by the Words, but in Wills, the Words muſt follow the Intent of the Deviſor; and ſuch a Conſtruction is to be made of them, as to make uſe of all the Words, and not of Part, and ſo as they may ſtand together, and have no Contrariety in them.

Shep. Abr. Part 11. p. 11. Voc. Teſt'. 6. That ſuch a Senſe ſhall be made of a Deviſe, that it may be for the Profit of the Deviſee, and not to his Prejudice.

Id. Ibid. 7. That general and doubtful Words in a Will, ſhall not alter an expreſs Deviſe before, nor carry any Thing contrary to the apparent Intent.

Id. Ibid. 8. That the Clauſes and Sentences of a Will ſhall be ſeverally tranſpoſed to ſerve the Meaning of it. And Conſtruction ſhall be made of the Words to ſatisfy the Intent, and they ſhall be put in ſuch Order as the Intent may be fulfilled.

Id. Ibid. 9. That no Senſe may be framed upon the Words of a Will, wherein the Teſtator's Meaning cannot be found.

Styles 148, 149. 10. That to give a Thing to ſuch a Perſon to whom the Law gives it, is as if it had not been given; and ſo a Deviſe of a Man's Land to his Heirs is void.

Shep. Abr. Part 11. p. 11. Voc. Teſt'. 11. That a Conſtruction of a Will muſt be gathered out of the Words of the Will, and not by any Averment.

1 Freem. 292. Steede v. Berrier. 5 Rep. 68. Ld. Cheyney's Caſe. 12. That though a Parol Averment ſhall not be admitted to explain a Will, ſo as to expound it contrary to the Import of the Words, yet when the Words will bear it, a parol Averment may be admitted.——As, for Inſtance, to aſcertain the Perſon, but in no Caſe to alter the Eſtate.

2 Freem. 267. Bamfield v. Popham. 13. That one Part of a Will ſhall be expounded by another: As where a Man leaves an Eſtate to another and his Heirs, and afterwards mentions to have given him an Eſtate-Tail; Heirs ſhall be taken to mean Heirs of the Body, and the Deviſee ſhall take only an Eſtate-Tail.

(G) How Wills may be avoided.

1. WILLS may be avoided either by Act of the Party himſelf, as by *Revocation*; or by legal Sentence after the Death of the Teſtator, as for *Fraud, &c.* Therefore we will conſider—

1. What ſhall be deemed a Revocation of a Will.

2. "By the 29 *Car.* 2. *cap* 3. it is enacted, That no Deviſe in Writing of "Lands, Tenements, or Hereditaments, or any Clauſe thereof ſhall be re- "vocable, otherwiſe than by ſome other Will or Codicil in Writing, or "other Writing declaring the ſame, or by burning, cancelling, tearing, or "obliterating the ſame by the Teſtator himſelf, or in his Preſence and by "his Directions and Conſent, but ſhall continue, *&c.* unleſs altered by ſome "other Will or Codicil in Writing, or other Writing of the Deviſor, ſigned "in the Preſence of three or more credible Witneſſes declaring the ſame: "And by the ſame Act, no Will in Writing concerning Perſonal Eſtates, "ſhall be repealed, nor any Clauſe or Bequeſt therein altered by Words, or "Will by Word of Mouth only, except the ſame be, in the Life of the "Teſtator, committed to Writing, and read to and allowed by him, and "proved to be done by three Witneſſes."

3. But

3. But where a Man, by Will in Writing, deviſed the Reſidue of his Perſonal Eſtate to his Wife, and after, ſhe dying, he, by a Nuncupative Codicil, bequeathed to *J. S.* all that he had given to his Wife, it was reſolved good; for, by the Death of the Wife, the Deviſe of the Reſidue was totally void; and the Codicil was no Alteration of the former Will, but a new Will for the Reſidue. Raym. 334.

4. Revocations by the Act of the Party are either expreſs, as where the Deviſor expreſsly declares his Mind, that his Will ſhould be revoked; or implied, as where the Eſtate or Thing deviſed is altered after making of the Will. 2 Abr. Eq. Caſ. 769. Sir Rich. Templeman's Caſe, Mich. 4 Anne in C. B. N. B. Where the Spiritual Court ſet aſide a Will as revoked by the Teſtator, their Sentence extends only to the perſonal Eſtate, and does not revoke a Deviſe of the real Eſtate. 3 P. Will. 166. Sir Samuel Marwood *v.* Turner. Implied Revocation

5. *Per Hardwicke* Lord Chanc. The general Principle is, that at the Time of the Deviſe, the Deviſor muſt have a diſpoſing Capacity, and an Eſtate in the Land deviſed; and the Eſtate muſt remain in the ſame Plight and Condition until his Death: For the leaſt Alteration by any Act of his, makes it a different Eſtate, and ſhews a different Intention, and therefore is an Actual Revocation. Thus if one ſeiſed in Fee deviſes, then inſeoffs another, to the Uſe of himſelf in Fee, though it is the old Uſe that remains, yet it is a Revocation, though it is his on the Feoffment. So of a Bargain and Sale without Inrolment. So if a Man thinking himſelf Tenant in Fee, deviſes, and then apprehending himſelf to be only Tenant in Tail, ſuffers a Recovery, with Intent to confirm his Will, it is a Revocation. As to Mortgages, they are Exceptions out of the Rule. At Law a Mortgage for Years, and in Equity a Mortgage in Fee, are Revocations *pro tanto* only; and the Reaſon is, that a Mortgage is only a Security; and tho' it be a Conveyance of a Real Eſtate, yet in this Court it is a Chattel Intereſt only, and goes to the Executor, and it gives no Dower. In the Caſe wherein theſe leading Principles were eſtabliſhed, after the Teſtator had deviſed all the Manors, Lands, Tenements, and Hereditaments, he by a Deed conveyed an Advowſon which he was ſeiſed of at the Time of making his Will, to, and to the Uſe of Truſtees and their Heirs; in Truſt to preſent the Church when void to a particular Perſon, if qualified, on the Terms preſcribed therein: And if ſuch Perſon ſhould be incapable, then to preſent ſuch Clerk as *A.* ſhould nominate; and in default of Nomination by him, as the Truſtees ſhould think fit. The Perſon intended was preſented; and on a Bill brought by the Heir at Law of the Teſtator, to have a legal Conveyance of the Reſidue of the Advowſon; the Queſtion was, whether this Deed, being only a Truſt for a particular Purpoſe, as it was alledged, was a total or partial Revocation? And determined by Lord Chanc. after arguing as above, that it was a total Revocation; it being a Grant of the legal Intereſt; and the Truſt was a real and beneficial Intereſt given by it to the Truſtees, that of nominating themſelves in Default of *A.*'s nominating: And he decreed a Conveyance to be made according to the Prayer of the Bill. MSS. Rep. Sparrow *v.* Hardcaſtle, in Canc'. Paſc. 27 G. 2.

6. *J. S.* ſeiſed of a Leaſe for Lives, deviſes it; and afterwards *J. S.* ſurrenders the old Leaſe, and takes a new one to him and his Heirs for three Lives. Decreed by Lord Chanc. *King*, that this Renewal of the Leaſe was a Revocation of the Will as to his Particular. 3 Will. Rep. 166, 170. Marwood *v.* Turner. For by the Surrender of the old Leaſe, *J. S.* the Teſtator, had put all out of him, had deveſted himſelf of the whole Intereſt, ſo that there being nothing left for the Deviſe to work upon, the Will muſt fall; and the new Purchaſe being of a Freehold deſcendible, could not paſs by a Will made before ſuch Purchaſe. Ib. 171.

7. So where a Teſtator deviſed by his Will a Leaſehold Eſtate under *Magdalen* College *Oxon*, and, after the making of his Will before his Death, renewed his Leaſe by ſurrendering the old one, and taking a new Leaſe. Determined 1743. MSS. Rep. Sir Tho. Abney *v.* Miller in Can. Trin.

Determined by Lord Chanc. that this was a Revocation of his Will. And though the Teſtator, after the Renewal, looking among his Papers, had ſaid this is my Will, that was held to be no Republication.

Fitzgibbons 195. Attorney General v. Governor and Co. of Chelſea Water-Works.

8. If the latter Part of a Will is inconſiſtent with the former Part of it, it ſuperſedes and revokes it. *Per Reynolds* C. B. and *Comyns* v. *Thompſon* Barons, *in Scacc.*'

2 Free. Rep. 224. Irod v. Hurſt.

9. It was agreed to be the conſtant Rule of this Court, that where a Legacy was given to a Child, who afterward upon Marriage, or otherwiſe, had the like or greater Sum, it ſhould be intended in Satisfaction of the Legacy, unleſs the Teſtator ſhould declare his Intent to be otherwiſe; and it was ſaid the Words of ratifying and confirming, do not alter the Caſe, tho' they amount to a new Publication, being only Words of Form, and declaring nothing of the Teſtator's Intent in this Matter. Thus—

Id. Ibid.

10. Defendant's Teſtator by his Will gave his four Daughters 600 *l.* a-piece, and afterward married his eldeſt Daughter to the Plaintiff, and gave her 700 *l.* Portion; after that he makes a Codicil, and gives 100 *l.* a-piece to his unmarried Daughters, and thereby ratifies and confirms his Will and dies. Plaintiff preferred his Bill for the Legacy of 600 *l.* given to his Wife by the ſaid Will. And his Honour held, that the Portion given by the Teſtator in his Life-time, ſhould be intended in Satisfaction of the Legacy.

Prec. in Chan. 183. Ward v. Lant.

11. *J. S.* had four Daughters, *A. B. C.* and *D.* and by his Will deviſed to *A.* 1000 *l.* and by the ſame Will deviſed to them 1500 *l.* a-piece for their Portions; which laſt Sums of 1500 *l.* were to be raiſed out of a Real Eſtate deviſed by his Will for that Purpoſe. *A.* marries in *J. S.*'s Life-time; and *J. S.* gave her 4000 *l.* Portion. And *per* Lord K. *Wright*, this 4000 *l.* Portion muſt be taken to be a Satisfaction of the 1500 *l.* given *A.* by the Will for her Portion; and a Revocation of the Will *pro tanto*: But as to the 100 *l.* that being a general Legacy, *A.* muſt have it notwithſtanding the 400 *l.* given her for her Portion.

Vin Abr. tit. Deviſe (R. 2.) Ca. 16. p. 140. Parker v. Lamb.

12. *J. S.* deviſed Lands in *S.* to *A.* his Son for ninety-nine Years, determinable upon three Lives, and by his Will charges the ſaid Lands with an Annuity of 40 *l. per Annum* to his Daughter *M.* and afterwards deviſes the ſame Lands for ninety-nine Years, determinable upon three other Lives, reſerving 50 *l.* a Year Rent; this is, during the Continuance of the Leaſe, a Revocation; but it is no Revocation as to the 40 *l. per Annum* Annuity, there being Rent enough reſerved to ſatisfy that.

Prec. in Chan. 263. Hoſkins v. Hoſkins.

13. *J. S.* by Will (*int' al*) deviſes to *B.* his younger Son 750 *l.* and afterwards buys him a Cornet of Horſe's Commiſſion, and paid 650 *l.* for it, and it was proved he intended this 650 *l.* ſhould be diſcounted out of his Legacy, and that he would ſtrike ſo much out of the Will, as ſoon as the Accounts came to *London* to him, but died before they came without altering his Will. Decreed that the Money paid for his Commiſſion, ſhall go in Diminution of the Legacy, and be taken in Payment and Satisfaction for ſo much.

Vin. Abr. tit. Deviſe (P.) Ca. 10 p. 136.

14. If a Man deviſes Lands, and afterward mortgages the ſame for Years, and then levies a Fine *ſur conuſance le Droit come ceo*, and not a Fine *ſur conceſſit*; this will be a Revocation; but if there had been a *Fine ſur conceſſit*, it had revoked only *pro tanto*.

Prec. in Chan. 298. Bird v. Hooper.

15. *A.* by Will gave his Children ſeveral Legacies, and to his eldeſt Son 2000 *l.* Afterward he gave him 400 *l.* to go to *Italy*, and being a Merchant, enters on the Debtor ſide of his Book, *My Son Debtor* 400 *l.* Then

His Honour mentioned the Caſe of Lord Guernſey, who married a Daughter of Sir John Banks, with whom he had a conſiderable Fortune in Land. Afterward Sir John builds a Houſe upon the Land, and being a Merchant, makes an Entry, Lord Guernſey Debtor ſo much, for building the Houſe; and then makes his Will, and deviſes the Reſidue of his Eſtate to his two Daughters: And yet it was held, that this Houſe ſhould fall into the Lump of the Fortune given to Lady Guernſey. Ibid.

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by a Codicil, having taken an Account of the Eſtate, and finding it would not anſwer all the Legacies, he retrenches 400*l.* out of each of the younger Children's Legacies, without taking any Notice of the eldeſt Son, or his 400*l.* His Honour decreed the whole 2000*l.* to the eldeſt Son.

16. A Man makes his Will duly executed and atteſted according to the Statute of Frauds and Perjuries, and at the ſame Time, in like Manner, executes a Duplicate thereof: Some Time after, the Teſtator, having a Mind to change one of his Truſtees, orders his Will to be wrote over again, without any Variation whatſoever from the firſt, ſave only in the Name of that Truſtee. And when it was ſo wrote over, he executes it in the Preſence of three Witneſſes, and the three Witneſſes ſubſcribed their Names, but not in his Preſence. After this the Teſtator cancels the Duplicate, by tearing off the Seal, and then dies: And the Queſtion was, Whether this ſecond Will, not being good, as a Will to paſs Lands, ſhould yet be a Revocation of the firſt; and if it ſhould not, whether the cancelling the other ſhould be a Revocation thereof within the Statute of Frauds and Perjuries. And it was decreed, that neither the making of the Second, nor the cancelling the firſt was a Revocation thereof; though in the ſecond there was an expreſs Clauſe, that he did thereby revoke all former and other Wills; wherein my Lord Chancellor took this Diſtinction, that the ſecond was not intended barely a Revocation of the firſt, ſo as to ſignify his Intention of dying Inteſtate, or without any Will; but it was intended as an effectual Will to paſs the Lands to the Perſons, and in the Manner thereby deviſed: And therefore if it was not good as a Will to that Purpoſe, it was no Revocation of the firſt, but as it was ſuppoſed to be valid as a Will for paſſing the Lands by the ſecond: And if a Man by his Will deviſes Lands to *A.* and after makes a ſecond Will, and thereby deviſes the ſame Lands to *B.* if this ſecond Will be not good as a Will to paſs the Lands to *B.* it ſhall be no Revocation of the Deviſe in the firſt to *A.* for it is plain *A.* was to loſe only what *B.* was to gain; and if *B.* gains nothing by the ſecond, *A.* ſhall loſe nothing that was given him by the firſt: But if a Man executes a ſecond Will, which appears to have no other Intention than to revoke the firſt, and to die inteſtate, though this ſecond be not in all Circumſtances duly executed as a Will whereby to paſs Lands, yet it will operate as a Revocation of the firſt: And as to the Cancelling or Tearing of the firſt Will, that is no Revocation of it in this Caſe, becauſe that was no ſelf-ſubſiſting independent Act, but done to accompany, or in a Way of Affirmation of the ſecond: It was done from an Opinion, that the ſecond had effectually revoked the firſt, and therefore he tears the firſt as of no Uſe: But the firſt was not effectually revoked by the ſecond: And the Act of tearing the firſt will not deſtroy it neither: For tho' a Man may, by the Statute of Frauds, as effectually deſtroy his Will, by tearing or cancelling it, as by making a ſecond; yet if he does make a ſecond, and intends that as a Revocation of the firſt, if it be inſufficient for that Purpoſe, as in the principal Caſe, the Tearing and Cancelling being only in Conſequence of his Opinion, that he made a good ſecond Will, it ſhall not deſtroy the firſt; but it ought to be ſet up again in Equity. 1 Abr. Eq. Caſ. 407.

17. But if a Man cancels or revokes either the Duplicate or original Will, this is an effectual Avoiding of both, they being both but one Will, and therefore muſt ſtand or fall together. 2 Vern. 742. Onions *v.* Tyrer.

18. A Man makes his Will in Writing, and thereby deviſes all his Real and Perſonal Eſtate to his Wife, her Heirs and Executors, in Truſt to pay his Debts and Legacies; and then deviſes ſeveral Legacies to 1 Abr. Eq. Caſ. 409. Hyde *v.* Hyde.

3 Chan. Rep. 155. S. C. and decreed, and adds, that all agreed that the ſecond Will, though not ſealed and ſubſcribed as the Statute of Frauds directs; yet it is good for the Perſonal Eſtate, it being *Caſus omiſſus* out of the Statute, and then it was good at Common Law. Ibid. 161.

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his Children and other Perſons, and concludes, In Witneſs whereof I have to this my Laſt Will and Teſtament, containing Nine Sheets of Paper, and to a Duplicate thereof, to be left in the Hands of ſuch a one, ſet my Seal to every Sheet thereof, and to the laſt of the ſaid Sheets my Hand and Seal, in the Preſence of three Witneſſes, who all ſubſcribed their Names in due Form of Law. Afterwards the Teſtator being minded to add other Truſtees to his Wife, and make ſome Alterations in his Will, ſends for a Scrivener, and gave Directions to prepare a Draught of Inſtructions for another Will, which the Scrivener does accordingly, which the Teſtator read over and approved of very well, and ſets his Hand to it; and being at a Tavern, thinking he had now made a new Will, he pulls out of his Pocket the firſt Will and tears off the Seals from the firſt eight Sheets, which the Scrivener ſeeing, aſked him what he was a doing? Why, ſays he, I am cancelling my firſt Will. Pray, ſays the Scrivener, hold your Hand, the other Will is not perfected; it will not paſs your Real Eſtate for want of being executed purſuant to the Statute of Frauds and Perjuries. I am ſorry for that, ſays he, and immediately deſiſted from tearing off any more of the Seals; and in ſome ſhort Time after dies without having done any Thing further to perfect the ſecond Will, or cancel the firſt. After his Death, on Application to the Spiritual Court by the Wife, who was made Executrix of his laſt Will, they ſentenced it a good Will as to the Perſonal Eſtate, and admitted her to prove it: And on a Bill brought by the Legatees againſt the Wife, and other Truſtees to have a ſpecifick Performance of the Truſt in the firſt Will, and that the Eſtate might be ſold, purſuant to the Directions of that Will. It was inſiſted upon, that the firſt Will was revoked either by making of the ſecond, or by tearing off the Seals from the firſt, but Lord Chancellor held, that the ſubſequent Will could be no Revocation as to the Real Eſtate, not being executed according to the Statute of Frauds and Perjuries: And that as to the tearing off the Seals from the firſt eight Sheets, that not being done *animo cancellandi*, was no Revocation; and that the Seal remaining whole to the laſt Sheet was ſufficient, and in Strictneſs it was not neceſſary that all the Sheets ſhould be ſealed: But becauſe the Spiritual Court had ſentenced the ſecond a good Will of the Perſonal Eſtate, his Lordſhip held it a good Will for the whole Perſonal Eſtate, and that ſuch Legatees of Perſonalties in the firſt Will, as are left out in the ſecond, muſt loſe their Legacies; but for thoſe that had Legacies by the firſt Will chargeable on the Real Eſtate, if the ſame Legacies were deviſed to them by the ſecond Will, that they ſhould ſtill continue chargeable on the Real Eſtate; provided ſuch Legacies were not increaſed or inlarged by the ſecond Will: For though the ſecond Will was not ſufficient in itſelf to charge the Real Eſtate, yet ſince the Real Eſtate remained well deviſed by the firſt Will, they ſhould be ſtill ſecured by that Real Eſtate; for they were not deviſed out of Land like a Rent, but only ſecured by Land, which before was well deviſed; but for new abſolute perſonal Legacies deviſed by the laſt Will, they ſhould be chargeable only upon the Perſonal Eſtate, and ſhould have the Preference to be firſt paid out of the Perſonal Eſtate, before the other Legacies, in the firſt Will, charged upon the Real Eſtate, becauſe they had ſeveral Funds, out of which they were to be paid; the Perſonal Legacies in the laſt Will out of the Perſonal Eſtate, which was well deviſed by that Will; and the Legacies charged upon, or ſecured upon the Real Eſtate, which was deviſed by the firſt Will, out of the Real Eſtate.

Vin. Abr. tit. *Deviſe*, (R. 4) Ca. 3. p. 142. Townſhend v. Pearce.

19. *A.* in *December* 1715 makes his Will, and ſigns, ſeals, and publiſhes it in the Preſence of four Witneſſes, who atteſt and ſubſcribe the ſame in his Preſence, and thereby gives to *H. P.* his Son, and to his Heirs and Aſſigns for ever his Lands, *&c.* The 2d of *January* following, he or-

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ders one *O.* to make an Alteration in his Will, and interlines these Words; "I give unto my Wife *A. P.* and her Assigns, my Lands in *W.* for her "Life; and after her Decease to my Son *H.* and his Heirs." The Will is read to the Testator, and he approves of it with the Interlineation: He puts his Seal upon the Wax in the Presence of three of the same Witnesses, but does not write his Name *de novo*, neither do the Witnesses subscribe theirs *de novo*. The Question was whether this was a good Devise to *A. P.* for her Life? The Doubt was chiefly upon the 29 *Car.* 2. whether this Alteration was not a Revocation within the Statute. Every Bequest is to continue in Force until the same be burnt, *&c.* by the Testator or his Direction, in his Presence, or unless the same be altered by some other Will or Writing of the Devisor, signed in the Presence of three or four Witnesses, declaring the same. If the Will be signed, it may be in any Part, and *per Parker* and *Eyre*, The putting a Seal is a good Signing; for, *per Parker* Ch. J. The Intention of the Parties signing it, and the Witnesses attesting, is only that the Witnesses may know it again. This Act is fully penned, and is not to be expounded away. *Per Powis*, Here is no Danger of Fraud or Perjury; here is a new Devise, and not an Alteration only. *Per Eyre*, Every Thing is right, save the new subscribing by the Witnesses: The Case of *Lee* v. *Libb*, in *Shower* 68, 69. is right; nobody can say this new Bequest was signed in the Presence of the Testator. *Per Eyre* and *Parker*, There must be more than a bare Revocation. It must be signed in the Presence of three Witnesses. The altering a Will must be understood of a Revoking, *i. e.* An Alteration by Revocation. The latter implies the whole Will, the former of any Part, otherwise this Alteration will clash with the former Clause; so that if the Testator revokes the Whole or Part, it shall be by Will or Writing, signed in the Presence of Witnesses, but they are not obliged to subscribe. *Per Eyre*, If *H. P.* had been here found Heir at Law, then *A.* the Lessor of the Plaintiff, might have been helped; for if this be an Alteration, so as *H.* is not to have the Lands till after *A.*'s Death, she will have an Estate by Operation and Implication of Law.

20. If *A.* devises Lands to *B.* and his Heirs, and afterwards mortgages the same Lands to *J. S.* for Years, or in Fee, though a Mortgage in Fee be a total Revocation at Law, yet in Equity it shall be a Revocation *pro tanto* only. 1 Vern. 329, 342, 97, 141, 182. 1 Salk. 158. S. P.

21. So if a Man seised in Fee devises it to *J. S.* in Fee or for Life, and afterwards makes a Lease to *J. D.* for Years, this, even at Law, shall not be a Revocation, but during the Years; for this Intent does not appear further than during the Term for Years. 1 Roll. Abr. 616. Montague *v.* Jeffries.

22. So if a Husband possessed of a Term for forty Years, devises it to his Wife, and after leases the Land to another for twenty Years, and dies; this Lease is not any Revocation of the whole Estate; but only during the twenty Years, and the Wife shall have the Residue by the Devise. Id. Ibid. Wilcox's Case.

23. But if *A.* devises Lands to *B.* and his Heirs, and twelve Years after leases the same Lands to *B.* for sixty Years, to commence after his Death, and delivers the Deed to a Stranger, to the Use of *B.* who does not deliver it to *B.* till after the Death of *A.* This is a Revocation of the whole Estate, for both Estates are not consistent nor can vest in *B.* at the same Time; and it was plainly the Intention of the Devisor, that *B.* should have the less Estate only. And it was so adjudged, though objected, that it was the Intention of *A.* that *B.* should have his Liberty to take by the Lease or Devise, *B.* not having agreed to the Lease in the Life of *A.* 1 Abr. Eq. Cas. 410.

24. But if the Lease made to the Devisee had been to begin either *in Præsenti* or *Futuro*, in the Life of the Devisor, it had not been a Revocation, for inasmuch as the Lease might have determined in his Life, it was consistent with his Will. Cro. Ja. 49. Coke *v.* Bullock.

25. So

2 Vern. 495. Lamb v. Parker. 2 Freem. 284 S. C. says, Lord Keeper seemed to be of Opinion, that it was not a Revocation because the three Lives in the Leaſe might die before the Teſtator, and then the Deviſe would take Place; but referred it to the Judges of B. R. by way of a Caſe to determine.

25. So where *A.* by Will deviſed to his younger Son a certain Meſſuage for ninety-nine Years, if three Lives lived ſo long, yielding and paying to his Siſter the Plaintiff, 20*l. per Ann.* until twelve Years old, and thence 40*l. per Ann.* for Life: And afterwards the ſaid *A.* for 300*l.* Fine demiſed the ſaid Meſſuage to *J. S.* for ninety-nine Years, if three Lives lived ſo long, yielding and paying 50*l. per Ann.* to *A.* the Teſtator, his Heirs and Aſſigns, and tho' it was held at the *Rolls* to be a Revocation, yet on an Appeal to my Lord Keeper, he decreed it to be no Revocation, and that the Daughter ſhould be paid her Annuity; and he ſaid, that the Rule is, where a ſubſequent Act ſhall amount to a Revocation by Implication, it muſt be a neceſſary Implication: And the Act muſt be wholly inconſiſtent with the Deviſe.

2 Vern. 241. Vernon v. Jones. 2 Freem. 117. S. C. ſays, the Lords Commiſſioners *Trevor*, *Rawlinſon*, and *Hutchins* were of Opinion, that the Surplus being to his own right Heirs, that it was ſtill in his own Power, and ſhould be ſubject to his Diſpoſal by the Will: And the Caſe of *Hall* and *Dench* was cited; where, after a Deviſe of Lands, the Deviſor made a Mortgage in Fee: And adjudged, that the Deviſee ſhould have the Equity of Redemption.——*Prec. in Chanc.* 32. S. C. ſays, the Lord Commiſſioners held, that neither the Mortgage and Fine, nor Deed of Truſt, ſhall be a total Revocation of the Will, being made for particular Purpoſes, but that after Debts paid, the Widow ſhall have the 200*l. per Ann.*

26. So if *A.* deviſes Lands to Truſtees to pay his Debts, and then to pay his Wife 200*l. per Ann.* for her Life; and the Teſtator living ſeveral Years after, his Debts increaſed from 2000*l.* to 10,000*l.* for 8000*l.* whereof his ſaid Truſtees were bound, and afterwards *A.* the Teſtator, by Deed and Fine, conveys his Lands to his ſaid Truſtees to ſell to pay his Debts, and the Surplus to him and his Heirs, and though the Wife joined with him in the Fine and Conveyance, yet this ſhall be no Revocation of the Wife's 200*l. per Ann.* and ſhe ſhall have the 200*l. per Ann.* out of the Surplus Money after the Debts paid.

1 Abr. Eq. Caſ. 411. 2 Freem. 202. Reſolved, it was a Revocation. And upon an Appeal ſo held in *Dom. Proc.* by a Majority of two Lords only.

27. But in a Caſe where *Edward* Earl of *Lincoln* had mortgaged the Manor of *S.* to the Defendant *Wynn* and his Heirs for 12000*l.* and afterwards, by his Will, in Default of Iſſue Male of his own Body, deviſed it to Sir *Fran. Clinton* (who was to ſucceed him in the Honour) for his Life, with Remainder to his firſt and other Sons in Tail Male, with other Remainders over; and appointed that his Houſehold Goods at his chief Houſe at *S.* ſhould remain there as Heir-looms to the next Heir Male, who ſhould be Earl *Lincoln* and made Sir *Francis Clinton* Executor: Afterwards the Earl (who was very whimſical) took a Fancy to one Mrs. *Calvert*, Daughter to the Lord *Baltimore*, and fancied he ſhould marry her, tho' it was proved in the Cauſe, there never was any Intention of ſuch Marriage in her, or in any of her Relations, nor any Treaty about it; and in this Fancy he makes a Leaſe and Releaſe of thoſe Premiſſes to the Defendant *Davenport* and *Townſhend* and their Heirs, (in Conſideration of the ſaid intended Marriage, as it was expreſſed) to the Uſe of himſelf and Heirs, till the ſaid intended Marriage took Effect: Then as to Part in Truſt for Mrs. *Calvert* and her Heirs, in lieu of Dower, and as to the reſt in Truſt that the Truſtees ſhould ſell it, to diſincumber the Part limited to Mrs *Calvert*, and the Surplus of the Money to his Executors and Adminiſtrators. There was no farther Progreſs towards the Marriage, and ſometime after the Earl died without any Alteration of his Will, and the Honour deſcended to Sir *Francis Clinton*, (who had but a very ſmall Eſtate, if any, who died ſoon after; and the Plaintiff, his eldeſt Son and Heir, an Infant of about ſeven Years old, brought his Bill to have the Redemption of the Mortgage, and a Conveyance of the Eſtate: And the Defendants, *A. B.* and *C.* who were Couſins and Coheirs of Earl *Edward*, brought a croſs Bill, that they might redeem and have the Eſtate conveyed

veyed to them. And the only Queſtion was whether this Leaſe and Releaſe were a Revocation of the Will? It was ſaid for the Plaintiff that the Earl had but an equitable Intereſt, the whole Eſtate being before mortgaged in Fee, and therefore it ought to be conſidered according to Equity; and that though ſuch a Leaſe and Releaſe would have been a Revocation of a Deviſe of a legal Eſtate, yet it will not be ſo here; For the Reaſon the Law goes upon in judging it a Revocation is, becauſe the Leaſe and Releaſe is a Conveyance of the Eſtate, and ſo *ex neceſſitate rei* a Revocation of the Deviſe: And it is plain the Law goes upon this, and not upon any ſuppoſed Alteration in the Perſon's Will. For if a Man makes a Will, and thereby deviſes Lands to *J. S.* and his Heirs, and afterwards articles to ſell the Lands to *J. D.* and his Heirs, and receives the Purchaſe Money, and dies before any Conveyance made, theſe Articles will be no Revocation of his Will: And yet it is as plain his Mind and Intention, as to thoſe Lands, is altered as much as if he had actually made a Conveyance to *J. D.* and in Caſe of an equitable Intereſt, the Leaſe and Releaſe makes no Alteration of the Eſtate, ſo as to induce a Neceſſity of adjudging it a Revocation, as there is in Caſe of a legal Eſtate: It is plain as to his Intention, that he did not intend any Revocation or Alteration of his Will, unleſs or until that Marriage ſhould take Effect; for by the Releaſe it is limited, that till that Marriage it ſhould continue to him and his Heirs, which is juſt as it was before; and that Marriage having never taken Effect, the Eſtate continues juſt as it was. And it cannot be pretended, that this Leaſe and Releaſe are any expreſs Revocation of his Will; and the Court of Chancery is ſo far from following the ſtrict Rules of legal Revocations, that it often relieves againſt them. And therefore if a Man deviſes *Blackacre* to *J. S.* and his Heirs, and afterwards mortgages it to *J. D.* and his Heirs, this, in Law, is a Revocation of the Deviſe, and yet in Equity it ſhall be none farther than to let in the Mortgage; and to this Purpoſe were cited ſeveral Caſes. And therefore ſince the Court of Equity muſt interpoſe for one Side or the other, it was concluded it ought to interpoſe for the preſent Earl, and that he ought to have the Redemption of the Eſtate, as deviſed by the Will of Earl *Edward*. For the Defendant it was ſaid, that ſuch a Leaſe and Releaſe would have been a Revocation of a Deviſe of a legal Eſtate, and that equitable Eſtates are governed by the ſame Rules that legal Eſtates are; and there is no Fraud or Circumvention, nor other equitable Circumſtances, to make the Court vary from that Rule in this Caſe; and the Will is in Diſinheriſon of the Heir, who is always favoured in all Courts. And as to the Caſes put, where Mortgages have been held to be no Revocation in Equity, it was ſaid, the Reaſon of that is, becauſe Mortgages are not conſidered as Conveyances of the Eſtate, but only Charges upon it: And my Lord Keeper was of this Opinion, and decreed the Plaintiffs Bill to be diſmiſſed, and the Coheirs to have the Redemption of the Mortgage.

28. So where Sir *John Huſband* by Will in Writing, dated the 12 of *Feb.* 1708, deviſed ſeveral pecuniary and ſpecifick Legacies, and then gave all the reſt of his Real and Perſonal Eſtate, after all his Debt and Legacies paid, to *John Pollen*, on Condition he took the Name of *Huſband* upon him, and the Heirs Male of his Body, with divers Remainders over: Afterwards by Leaſe and Releaſe, the 30 of *Aug.* 1709, Sir *John Huſband* together with *J. S.* his Truſtee, conveyed ſeveral Manors and Lands in the County of *Warwick* to Truſtees and their Heirs, to the Uſe of himſelf for Life, without Impeachment of Waſte, and that the Truſtees and their Heirs ſhould execute ſuch Conveyance and Conveyances thereof as the ſaid Sir *John* by Writing under his Hand and Seal, or by his Laſt Will and Teſtament, ſhould direct or appoint; and in 1710 Sir *John* died, without altering or revoking the ſaid Will, or making any other Appointment

1 Abr. Eq. Ca. 412. Pollen v. Huſband.

Appointment touching the ſaid Real Eſtate: And the Queſtion was, Whether this Leaſe and Releaſe were a Revocation of the Will or not? the original Bill of *Pollen* being to eſtabliſh the Will, and the croſs Bill to ſet aſide the Will, and have an Account of the Profits. And it was decreed, that the Leaſe and Releaſe were a Revocation of the Will.

2 Vern. 720. Clarke *v.* Berkley.

29. *A.* having Iſſue four Daughters, and no Male Iſſue, deviſes Lands to Truſtees, in Truſt to permit his Daughter *S.* to receive the Rents and Profits until her Marriage or Death; and in Caſe ſhe married with the Conſent of two of the Truſtees and her Mother, then to convey the Premiſſes to her and her Heirs; but if ſhe died before Marriage, or married without ſuch Conſent, then to convey to other Perſons: Afterwards *S.* married in the Life-Time of her Father, and with his Conſent, and he ſettled Part of thoſe Lands on her and her Huſband, and died. And it was held, that this Settlement was no Revocation of the Will, as to the Deviſe of the other Lands.

Vin. Abr. tit. *Deviſe*, Ca. 11. p. 154. Clarke & *Ux v.* Lucas *& al'.*

30. So *J. S.* having four Daughters, *A. B. C.* and *D.* in 1705, by Will deviſes ſeveral Parcels of his Eſtate ſeverally to his four Daughters, and *int' al'* he deviſes to Truſtees all his Lands, Tenements, and Hereditaments, in *E.* and *F.* or either of them, or near thereto adjoining, in Truſt for *A.* until her Marriage or Death; and in caſe ſhe marries with the Conſent of her Truſtees, then for her and her Heirs, or for ſuch Perſon as ſhe ſhould appoint, *&c.* But in Caſe ſhe ſhould marry without Conſent of her Truſtees, and forfeit her Eſtate, then to her other Siſters equally among them, *&c.* In 1708 the Plaintiff *Clark* married *A.* with the Conſent of *J. S.* and he ſettles upon the Marriage (his Wife joining with him, who had theſe Lands in Jointure) Part of theſe Lands deviſed to her by his Will, after the Death of her Mother, and alſo 7*l. per Annum* in Fee-farm Rent, which was doubtful if it paſſed by the Will or not. In 1709 *J. S.* died without altering his Will. (Note *J. S.* in a Letter to *Clarke* upon the Treaty of Marriage, declares, what he will give him with his Daughter in preſent, and that ſhe will be a better Fortune at his Death.) *Quære*, If this Deviſe to *A.* in Fee, upon Condition of marrying with the Conſent of Truſtees, be diſpenſed with or performed by her marrying in *J. S.*'s Life-Time, and with his Conſent? And *Cowper* C. was of Opinion, that by the Marriage with the Conſent of the Father, the Condition is diſpenſed with, and the Deviſe become abſolute.

For *per* Lord Chanc. Conditions of this Kind, be the Conditions precedent or ſubſequent, are in Nature of Penalties and Forfeitures; and if the ſubſtantial Part and Intent be performed, Equity ſhould ſupply ſmall Defects, and favour the Deviſee: And his Lordſhip obſerved, that it was admitted that here was no Forfeiture; and ſaid, ſhould he take away the Eſtate from the firſt Deviſee, when it cannot go to the Deviſee over, it would deſcend to Heirs at Law, which certainly was never the Intent of the Teſtator. One Queſtion in this Caſe was, if the Father giving and ſettling, upon *A.*'s Marriage, part of the Lands deviſed to her by the Will precedent to the Marriage, be a Revocation of the whole Deviſe to her, or only *pro tanto*, as was ſettled on her upon the Marriage? And Lord Ch. held, that the Lands ſettled by the Father, upon the Marriage of *A.* is a Revocation only *pro tanto* of the Lands deviſed to her, and not of the whole Deviſe; for implied Revocations ought to be plain and certain, and the Inconſiſtency moſt apparent, which is not ſo in this Caſe: For why may not the Father give his Daughter all theſe Lands at his Death, though it was not proper for him to part with them all in his Life time? Though he gave Part by Deed, why may he not give her the reſt by Will? Decreed for Plaintiff the Wife, for all the Lands deviſed to her by Will. Ibid. And ſee ante——2 Vern. 720. Clarke *v.* Berkley, &c.

2 Vern. 23. Wilkinſon *v.*——

31. *A.* made his Will and thereof his Brother Executor, and deviſed unto his Executor all his Eſtate both Real and Perſonal, and four Years afterwards he marries, and then by a Codicil makes his Wife his Executrix. And the Queſtion was, Whether the Brother ſhould have the Perſonal Eſtate: And it was urged, that he ſhould; for he does not take it as Executor only, but by expreſs Words of Gift in the Will, and it appears that there was not only a Benefit intended him as Executor, for even the Real Eſtate was deviſed to him: But it being in Proof that he had not any the leaſt Real Eſtate in the World, it was ſaid by my Lord Chancellor, that the Perſonal Eſtate was deſigned him only as Executor: And it was thereupon decreed for the Widow, the Executrix.

32. If

32. If *A.* by his Will deviſes all the Reſidue of his Perſonal Eſtate to *B.* and *C.* and makes them Executors; and after, by a Codicil, cancels and revokes every Legacy, Thing, and Part relating to *B.* and revokes his being Executor: *C.* ſhall have the whole. A Revocation, without a new Gift, ſhall have the ſame Effect as if it had been expreſsly given; and whether it be by Codicil or Obliteration, it is the ſame. MS. Rep. Humphries *v.* Taylor in Can. Hil. 25 G. 2.

33. An Alteration of Circumſtances has been conſidered as an implied Revocation.—Thus,

34. *J. S.* being a Bachelor, made his Will, and deviſed a Legacy of 500 *l.* to his Brother, and other Legacies to other Perſons, and deviſed his Real Eſtate to *Eliz. Cloſe* and her Heirs; and afterwards intermarries with the ſame *Eliz. Cloſe* and died, leaving her *Privement enſeint* with a Son, without making any Alteration in his Will: And the main Queſtion in the Caſe was, Whether this Alteration in the Teſtator's Circumſtances did, of itſelf, without more ado, amount to a Revocation. Thoſe who argued for its being a Revocation, relied on the Caſe of one *Ayres (a)*, in which it was reſolved by the Judges, that where a Man that was unmarried made a Will and deviſed away his Eſtate, and afterwards married and had a Child, and died without making any Revocation of his Will, that this Alteration of Circumſtances was, in itſelf, a Revocation of the Will. And a Caſe was cited out of *Cicero (b)*, where one thinking his Son dead, deviſed his Eſtate to another; yet the Son returning, it was held he ſhould have it, becauſe it was not to be ſuppoſed he would have diſinherited him without Reaſon. On the other Side it was argued, that though Alteration of Circumſtances might, in ſome Caſes, amount to a Revocation of a Will, yet it does not in this Caſe; for there is nothing but what a reaſonable Man might do, nothing unjuſt or unjuſtifiable. It appeared he had an Intention of marrying *Eliz. Cloſe* when he made his Will, tho' perhaps he might not know when he died that his Wife was *enſeint*, or if he did, yet it is not uncommon for many who are kind to, or fond of their Wives, to leave their Children wholly in their Power, to make them the more dutiful to her, and that he muſt know the Son would be the Wife's Heir, as well as his; and would have the Eſtate as ſuch, if ſhe did not diſpoſe of it from him. Lord Keeper was of clear Opinion, that Alteration of Circumſtances might be a Revocation of a Will of Lands as well as of a Perſonal Eſtate; and that notwithſtanding the Statute of Frauds and Perjuries, which does not extend to an implied Revocation: But no ſuch Alteration appears here, for no Injury is done any Perſon; and thoſe are provided for whom the Teſtator was bound to provide for, and ſo eſtabliſhed the Will. 1 Abr. Eq. Caſ. 413. Brown *v.* Thompſon. 1 Will. Rep. 304. in a Note, this Reporter ſays, that this Caſe was heard at the Rolls, 8 Dec. 1701. where Sir John Trevor held, that a ſubſequent Marriage, and having Children, was a Revocation of a Will of Land, and diſmiſſed the Bill of the Legatees, claiming Legacies charged on the Eſtate by ſuch Will: And the Reporter adds, that he finds in the Regiſter's Book that Wright, Lord Keeper, in July following, reverſed the Order of Diſmiſſion, and decreed the Payment of the Legacies (*a*).

1 Will. Rep. 304. S. C. cited by Sir John Trevor, Maſter of the Rolls, and appears to have been the Caſe of Eyre *v.* Eyre, ſaid to be reported to Sir John, by Treby C. J and ſome eminent Civilians. Ibid. in a Note. (b.) Vid. Cic. de Oratore, Cantab. Ed. p. 69, 102, &c. Dig. L. ult. de Hæred. Inſt.

35. Tho' Marriage and the having of Children has been deemed a Revocation of a Will; yet it is only a preſumptive Revocation; for if it appears by any Expreſſion, or other Means, to be the Intent of the Deviſor, that his Will ſhould continue in Force, the Marriage will be no Revocation of it. 1 Ld. Raym. 441. Lugg *v* Lugg.

36. A ſubſequent Deviſe to a Perſon incapable of taking, is a Revocation of a precedent Deviſe to a Perſon capable. This was approved by the Counſel on both Sides as good Law. Thus, in a— 10 Mod. 233. Roper *v.* Radcliffe.

37. Deviſe of Lands to *A* if afterward the Deviſor deviſes the ſame Lands to *B* who was a Papiſt, both Deviſes are void; for though the laſt is void as a Will, yet it is good as a Revocation. Vin. Abr. tit. Deviſe (R 3) p. 141.

Vin. Abr. tit. Deviſe (Y) Ca. 2. Saunders v Hawkins.

38. A Deviſe was made of a Term carved out of an Inheritance for ninety-nine Years, before the Statute of 3 & 4 *W.* & *M. c.* 14. of fraudulent Deviſes, in Truſt to pay 14 *l. per Annum* to a Grand-daughter for Life; and after the making this Will, the Deviſor mortgaged this Land for five hundred Years (which is a Revocation in Law for the Term, but the Deviſee has an Equity to redeem the Mortgage) the Mortgagee aſſigns over the Mortgage to the Plaintiff, who was a Creditor by Bond to the Teſtator, and the Reverſion in Fee deſcended to the Teſtator's Heir at Law. *Per Cowper* C. the Mortgage is a Revocation *pro tanto* of the Deviſe of the Annuity, and ſhe muſt keep down the Intereſt, or pay a third Part of the Redemption; but being a Deviſee ſhe may redeem the Mortgage without paying the Bond.

Vin. Abr. tit. Deviſe (R. 6.) Ca. 25. p. 147. Bernardiſton v. Carter.

39. *A.* deviſes Land to an Executor for Payment of Debts, and recites that a particular Schedule of them was annexed to the Will, Remainder over. Afterwards he mortgages Part of the ſaid Lands, and pays moſt of the Schedule Debts with the Money. And it was decreed, that this Mortgage is not Revocation, neither in all, nor Part, and that the Will ought to extend to all the Debts that ſhould be owing at the Time of his Death, and not to the Schedule Debts only; and that the Mortgage was only a Security, and not an Appointment how it ſhould be made. But this Decree was reverſed, though without Prejudice to Heir at Law.

Prec. in Chan. 514. Harkneſs. v. Bayley.

40. If Lands are deviſed to one in Fee, and afterward mortgaged to the ſame Deviſee, it is a Revocation *in toto*, being inconſiſtent with the Deviſe; though it was agreed, if the Mortgage had been to a Stranger, it had been a Revocation *quoad* the Mortgage only. Decreed *per* Lord *Macclesfield.*

1 Will. Rep. 681. Hartop v. Whitmore. Prec. in Chan. 541. S. C. ſtates it thus: *J. S.* by Will gave 300 *l.* Portion to *M.* his Daughter, if ſhe married with her Mother's Conſent, but if not, then 200 *l* only: *M.* afterward in the Life-time of her Father and Mother, married without the Conſent of either of them, but the Father was afterward prevailed on to give her 200 *l.* and died without altering his Will. *M.*'s Huſband afterwards becoming a Bankrupt, his Aſſignees brought a Bill to have the 300 *l.* or at leaſt the 200 *l.* given *M.* by her Father's Will; but the Bill was diſmiſſed, for that the 200 *l.* given by the Father in his Life-time, was a Satisfaction of the Legacy, and a Revocation of the Will as to that Portion; and the 300 *l.* was to take place on her marrying with her Mother's Conſent, which could only be intended after the Father's Death, and conſequently the Legacy never became due at all.

41. *J. S.* by his Will gives his Daughter 500 *l.* for her Portion, and afterwards marries her to *A.* and gives her 300 *l.* for her Portion in Marriage, and lived four Years after without revoking his Will. Afterwards the Huſband is a Bankrupt, and the Aſſignees brought a Bill againſt the Father's Executor for the 500 *l.* or at leaſt to recover 200 *l.* to make up the Portion *tantamount* to the 500 *l.* Legacy. Lord Ch. *Parker* with great Clearneſs held, that giving a Daughter a Portion by Will, and afterwards a Portion in Marriage, is by the Law of all other Nations, as well as *Great Britain*, a Revocation of the Portion given by the Will; and diſmiſſed the Bill with Coſts.

Vin. Abr. tit. Deviſe (Y. 2.) Ca. 10. p. 158. Pepper & Ux'. v. Winyeve & Ux'.

42. Teſtatrix having three Daughters *A. E.* and *M.* by Will deviſed 1000 *l.* to *A.* 800 *l.* to *E.* and 500 *l.* to *M.* After this Will was made, Plaintiff courted *A.* and upon a Treaty of Marriage, Teſtatrix gave a Note for 500 *l.* payable within ſix Months after the Marriage to Plaintiff, in Augmentation of her Daughter's Portion left her by her Father; and the next Day the Marriage was had; and upon the ſame Day the Teſtatrix was taken ill, and died ſix Days after, without altering or making a new Will; but ſhe did declare, that ſhe did intend that her Daughter *A.* ſhould have but 1000 *l.* from her, and that now ſince ſhe had given her this 500 *l.* ſhe muſt alter her Will; and ſent for an Attorney to do it; but when he came ſhe was lightheaded, and died ſoon after. And it was ſaid by the Defendants, the Executors, that the Teſtator's Aſſets were not ſufficient to pay Plaintiff the 500 *l.* upon the Note, and the 1000 *l.* Legacy, and likewiſe the Legacy left to the other two Daughters. And two Points were made; firſt,

first, If this 500 *l.* Note ſhall be taken in Part of Satisfaction of the 1000 *l.* Legacy? Secondly, If parol Evidence ſhall be admitted to prove the Intent of the Teſtatrix? And *per* Lord Ch. *Parker*, Circumſtances of Teſtatrix and her Family may be given in Evidence to expound the Will, but not any parol Declarations to explain the Words of the Will, or to control it: That in this Caſe there is no Doubt upon the Words of the Will; but the Queſtion is, if the Teſtatrix has not advanced Part of the Legacy in her Life-time upon the Marriage of her Daughter? And the Evidence is only as to the Satisfaction; and thereupon his Lordſhip admitted the Evidence to be read; and directed the Maſter to ſee if there were Aſſets ſufficient to pay all the Legacies; and upon Report the Court to determine as to the *Quantum* due to the Plaintiff.

43. *J. S.* deviſed to *M.* his Wife ſix Houſes in Bar of Dower, and, ſubject to his Legacies, he deviſed (the reſt of) his Real and Perſonal Eſtate to his two Daughters, and their Heirs, in Moieties; and afterwards, in Conſideration of the Marriage of *A.* his eldeſt Daughter with *B. J. S.* by Marriage Articles covenants to ſettle one Moiety of his Real Eſtate to the Uſe of himſelf for Life, Remainder to the Uſe of the ſaid *B.* and *A.* his intended Wife for their Lives, Remainder to the younger Children of the Marriage in Tail general, Remainder to the ſaid *B.* in Fee; and alſo covenanted that he would ſtand poſſeſſed of one Moiety of all ſuch Perſonal Eſtate as he ſhould leave at his Death (ſubject only to his Debts, and ſuch Legacies as ſhould amount to 5000 *l.*) in Truſt for *B.* and his ſaid intended Wife for their Lives, and afterwards to be paid to their younger Children. Lord Ch. *King* held, that though this was but a Covenant, and therefore at Law no Revocation of the Will by which the Teſtator had diſpoſed of his Real Eſtate, yet that the ſame being for a valuable Conſideration, was in Equity *tantamount* to a Conveyance, and conſequently in Equity a Revocation of the Will as to the Moiety of the ſix Houſes deviſed to the Teſtator's Wife, ſo that *B.* was intitled to one clear Moiety of the Real Eſtate, and to an Account of the Rents, *&c.* thereof, from *J. S.*'s Death; but as to the ſix Houſes deviſed to the Teſtator's Wife, it being his Intent that ſhe ſhould have them, the Court held, that ſhe ſhould have a Satisfaction out of the remaining Moiety, and that the Wife ſhould not ſuffer by the Marriage Articles, there being enough out of the other Moiety to ſupply and ſatisfy the Deviſe of the ſix Houſes to her. Therefore as to the other Moiety of the Real Eſtate, it was decreed, that the Teſtator's Widow was to have for her Life ſix Houſes, Part thereof, and the Reſidue of ſuch Moiety ſubject to the Wife's Eſtate for Life in the ſix Houſes, to be divided between the two Daughters equally. 2 Will. Rep. 328 Rider *v.* Wager. And his Lordſhip thought this Caſe the ſtronger, becauſe, after the Marriage Articles entered into, *J. S.* had executed a Codicil, confirming his Will ſubject to the Articles, which Confirmation was a Republication of his Will and as if he had wrote it over again, or had afterward for a valuable Conſideration aſſigned over a Moiety of his Real and Perſonal Eſtate to his eldeſt Daughter, by which the ſaid Moiety thus diſpoſed of did no longer continue any Part of the ſaid *J. S.*'s Eſtate: So that the Teſtator afterward by deviſing a Moiety of his Real and Perſonal Eſtate muſt be intended to have meant the remaining Moiety only, and to have divided that Moiety into Moieties. Ibid. 334. Note, after the making of the Will and Codicil, the Teſtator and his Wife, by Leaſe and Releaſe and Fine, mortgaged the Premiſſes; and it was urged, that this was a Revocation of the Will; but *per* Lord Chanc. it can only be a Revocation *pro tanto*. Ibid. 334.

44. *J. S.* on his Marriage with *F.*'s Daughter, ſettled 500 *l. per Annum* on her; he afterward ſurrendered ſome Copyhold Eſtates to the Uſe of his Will which he made, and gave the Copyhold to his Wife. Afterward *J. S.* on the Death of his Wife's Father, became intitled to 1500 *l.* in Right of his Wife; then *J. S.* levied a Fine, and made a new Settlement, and increaſed her Jointure 300 *l. per Annum*, but never altered his Will. And *per* Lord Chanc. the Settlement is a Revocation of the Will, for ſuch Lands as are compriſed in it; but the Copyhold is not, and therefore paſſes by the Will. Select Caſes in Chanc. 48. Lannoy *v.* Lannoy.

Select Cases in Chanc 63. Gibſon *v.* Scudamore.

45. *J. S.* in 1699 leaves to *A.* 8784*l.* in Truſt, to be by her inveſted in Lands, and to ſettle the ſame on herſelf for Life, Remainder to the Heirs of *B.* A Decree was had againſt *A.* to lay out the Money in Lands, and to ſettle the ſame according to *J. S.*'s Will. *A.* purchaſes Land to the Value of 3300 *l.* and deviſes thoſe Lands to *C.* (who was Heir at Law to *B.*) and her Heirs, and gives ſeveral Legacies, which could not be paid if the Deviſe were not to be taken as Part of Satisfaction; and for that Reaſon it was ſo decreed, *per* Lord Chanc. *King*.

Vin Abr tit. Deviſe (R. 6.) Ca. 30 p. 148. Luther *v.* Kirby. 3 Will. Rep. 169. by way of Note cites S. C. and ſays, the Judge's Certificate appears to be ſo by the Regiſter's Book; with which Lord Chanc. King

46. *A.* and *B.* were Tenants in common of Lands in Fee. *A.* by Will, dated 25 *Jan.* 1719, deviſes her Moiety of the ſaid Lands unto Truſtees and their Heirs, upon Truſt to ſell the ſame for the Purpoſes therein mentioned; and afterward *A.* and *B.* made Partition by Deed, dated 16 *May* 1722, and a Fine was levied, and the Uſes were declared to be, as to one Moiety in ſeveralty to *A.* in Fee, and as to the other Moiety in ſeveralty to *B.* in Fee. In 1724, *A.* died without revoking or altering her ſaid Will, leaving *J. S.* her only Son. Lord Chancellor declared that the Will was well proved, but referred it to the Judges of *B. R.* whether the Deed of 16 *May* 1722, and the Fine levied purſuant thereto, was not a Revocation of the Will. And *Raymond* Ch. J. *Page*, *Probyn* and *Lee* Juſtices, certified their Opinions to be, that the Will was not revoked by this Deed and Fine, and that *A.*'s Share of the Land contained in this Deed and Fine doth paſs by the Will.

concurred, and ordered, that the ſeveral Truſts in *A.*'s Will ſhould be eſtabliſhed: But adds, that if *A.* deviſes Lands and levies a Fine, and the Caption and Deed of Uſes are before the Will, but the Writ of Covenant is returnable after the Will, this ſeems a Revocation; becauſe a Fine operates as ſuch from the Return of the Writ of Covenant, and not from the Caption.——See Salk. 341. Lloyd and the Lord of Say and Seale; and yet this is an hard Caſe, ſince by the Caption the Party Conuſor does all his Part, and the Reſt is only the Act of the Clerk or his Attorney, without any particular Inſtructions from the Party.

MS. Rep. Parſons *v.* Freeman, M. 25 G. 2.

47. By Marriage-Articles it was agreed, that the Wife's Lands, whereof ſhe was ſeized in Tail, ſhould be conveyed to the Huſband in Fee; they married, the Huſband made his Will and deviſed theſe Lands, then the Huſband and Wife ſuffered a Recovery of theſe Lands, to ſuch Uſes, and for ſuch Eſtates, as they ſhould jointly appoint, and in default of ſuch Appointment, to the Uſe of the Huſband and his Heirs. She died without appointing. *Per Hardwicke* Chanc. This amounts to a Revocation of the Will. And in this Caſe the following Rules were laid down.

48. If a Man ſeized in Fee deviſes, and then makes a Conveyance by Fine, Feoffment or Recovery, and takes back a new Eſtate, it is certainly a Revocation; and ſo if he takes back the old Uſe unaltered, from a Preſumption that he could not have made ſuch a Conveyance, without an Intention to alter his Will: But if after making his Will he had made a Leaſe, or charged it with a Sum of Money, *&c.* it would only have been a Revocation *pro tanto*. The Rules are the ſame in the Deviſe of a Real, and of a Perſonal Eſtate, with regard to Charges made afterward: But if a Man, having an equitable Eſtate in Fee, deviſes it, and then takes a Conveyance of the legal Eſtate; it is no Revocation. The equitable Eſtate will not paſs by Will, but the Heir at Law by deſcent of the legal Eſtate, may become a Truſtee for the Deviſee, who may call for a Conveyance of the Eſtate. If a Man contracts by Articles for the Purchaſe of Lands, and before a Conveyance, deviſes the Lands and dies; the Deviſee ſhall have the Lands and call for a Conveyance, from the Vendor. If a Man, ſeized of a legal Eſtate, makes his Will, and then conveys the legal Eſtate to another in Truſt for himſelf, it is a Revocation. If in this Caſe the Huſband had only taken the legal Eſtate by the Recovery to execute it into the equitable Eſtate, it would have been no Revocation; but new Uſes are appointed, and though the Wife died without making any Appointment, that will not alter the Caſe, for here he

took

took the Fee by the Recovery differently qualified, ſubject to different Conditions, differently conveyed. But if two Parceners make Partition, levy a Fine, and declare the Uſe, that will not be a Revocation, becauſe it is to effectuate the Partition.

49. *A.* being ſeized in Fee, ſettled his Eſtate by Leaſe and Releaſe in 1712 to the Uſes therein after ſpecified, with Liberty nevertheleſs at his Will and Pleaſure to diſpoſe of, alienate or change the ſaid Eſtate, or any Part thereof, for any Eſtate or Eſtates whatſoever, as he ſhould think fit, and to revoke all and every the Uſes thereby limited, and then declares the Uſes to himſelf for Life, with ſeveral Remainders, and a Remainder over to *D.* in (Fee) Tail. The ſaid Deed contains the following Powers: Firſt, A Power for *A.* by any Deed or Writing, ſigned, ſealed, and delivered in the Preſence of two or more Witneſſes, to demiſe, leaſe, limit, or appoint, the ſaid Premiſſes to any Perſon whatſoever, for any Term or Terms whatſoever, and for ſo much yearly Rent as he ſhould think fit. And that it ſhall and may be lawful to and for the ſaid *A.* at any Time during his natural Life, at his Will and Pleaſure, to grant, ſell, or demiſe the ſaid Premiſſes, or any Part thereof; or by any Deed or Writing under his Hand and Seal, or by his laſt Will, *&c.* in Writing, ſigned, ſealed, delivered, and publiſhed, in the Preſence of three or more Witneſſes, to revoke, repeal and make void, all and every, or any the Uſe and Uſes, Eſtate and Eſtates, Truſts and Limitations before raiſed, and to declare or limit the ſame, or ſuch new Uſes as ſhould ſeem moſt meet to him, and then and from thenceforth, the Eſtates before limited and ſo revoked, to ceaſe, *&c.* And that the ſaid *A.* may diſpoſe of the ſame Premiſſes, and every Part thereof, to ſuch other Perſon and Uſes as he ſhall think fit; any Thing, *&c.* to the contrary notwithſtanding. The firſt Part of this Proviſo, *viz.* to grant, ſell, or demiſe, appears inſerted by Interlineation.——In 1715 *A.* by Leaſe and Releaſe, reciting that he was indebted as ſpecified in a Schedule annexed, conveyed his Eſtate to *W. R.* and *W. S.* and their Heirs, in Truſt to pay the ſaid Debts by the annual Profits, or Mortgage, or Sale of the Premiſſes, and after Payment thereof, to pay the Overplus, if any, and reconvey ſuch Parts of the Premiſſes as ſhould remain unſold, to the ſaid *A.* or to ſuch Perſon and Perſons, and to ſuch Uſes, *&c.* as *A.* by any Deed or Writing, under his Hand and Seal, atteſted by two or more credible Witneſſes, ſhould limit, *&c.* This Releaſe was atteſted by two Witneſſes only. *A.* died without Iſſue. Lord Chancellor, aſſiſted by Lord Chief Baron *Reynolds*, and the Maſter of the Rolls, was of Opinion, that *A.* intended to reſerve an abſolute Power over this Eſtate, and either to revoke it by an expreſs Revocation, or by a Conveyance to different Uſes, which are the two Kinds of Revocation, as is evident as well from the Preamble which is interwoven with the Conſideration of the Deed, as from the Proviſo: And in Conſequence of that Intention, it is reaſonable to ſuppoſe he meant to have a Power to defeat it without taking any Notice of it, and if no Power had been reſerved in the Body of the Deed, then would the Preamble have given a general Power. That a Conveyance to different Uſes would have been a Revocation as effectual as an expreſs Revocation, and that he thought any other Conſtruction would be forced and unnatural. That if *A.* had ſtopped with the firſt Words of the Proviſo, *viz.* to grant, ſell, or demiſe, he had reſerved an abſolute Power. Then come the Words, Or by any Deed or Writing. *Or* is plainly a Disjunctive introductory of a different Sentence, and a different Power, which is plain by the Words immediately following, *viz.* "And then the Uſes ſo revoked and repealed," which refer to the expreſs Power of Revocation. That if the ſecond Part of the Clauſe, or by any Deed or Writing, *&c.* had been dropped, (and it had been) or to repeal, *&c.* it is plain they would be diſtinct Powers: And his Lordſhip aſked, Why thoſe Words ſhould alter the Caſe? That the Circumſtance

Lill. Pract. Conv. 390, 400. Fitzgerald v. Lord Fauconberg. Fitzgibb. Rep. 207. S. C. and as to the Interlineation, Lord Ch. ſaid, that the Party that put it in thought it would be of ſome Uſe or other, and it could be of no Uſe but to give *A.* an unlimited Power over the Eſtate; and as *A.*'s Intention was to reſerve ſuch a Power, his Lordſhip ſaid he would not abridge it. Ibid. 223.

Circumſtance of three Witneſſes, is only applicable to the expreſs Revocation; but it neither goes to the firſt Power, nor to the general Power of diſpoſing at the End of the Clauſe, *viz.* And that the ſaid *A.* ſhall and may diſpoſe, *&c.* which is as much a diſtinct Power as can be, and is larger than the firſt; for by this he might give his Eſtate (Tail) by Will. That the expreſs Power of Revocation could not by this Conſtruction be thought nugatory, for within the firſt Power he could not be reinſtated in his former Eſtate without a Conveyance and Reconveyance; nor could he have deviſed it. But admitting it to be ſo, he thought general Intention is not to be ſuperſeded, becauſe a ſubſequent Part of the Deed is Surpluſage: And that the whole legal Eſtate paſſed to the Truſtees by the Deed of 1715. Decreed 12 *June* 1730.

2 Will. Rep. 624. Cotter *v.* Layer.

50. Tho' a Covenant or Articles do not at Law revoke a Will, yet if entered into for a valuable Conſideration, amounting in Equity to a * Conveyance, they muſt conſequently be an equitable Revocation of a Will, or of any Writing in Nature thereof. A Woman's Marriage is alone † a Revocation of her Will.

* See S. P. reſolved in the Caſe of Sir Barnham Ryder and Sir Charles Wager. Ibid. 332. † See 4 Rep. 61.

3 Will. Rep. 163. Marwood *v.* Turner.

51. Tenant in Tail, Remainder to himſelf in Fee, deviſes his Lands to *A.* and then ſuffers a Recovery to the Uſe of himſelf in Fee, and dies without Iſſue male; this is a Revocation of the Will.

Vin. Abr. tit. Deviſe (R. 2.) Ca. 17. p. 140. Hyde *v.* Maſon.

52 *A.* 23d *June* 1729 made his Will, and executed two Duplicates thereof before three Witneſſes, and made *B.* and *C.* (ſince deceaſed) Executors; and one of the Duplicates was delivered to *B.* *A.* died 2 *Oct.* 1730, and about three Weeks before his Death he made ſeveral Alterations and Obliterations with his own Hand, in the Duplicate remaining in his own Cuſtody, making a new Deviſe of his Real Eſtate, and a new reſiduary Legatee, and a new Executor, entirely ſtriking out the Names of the firſt Deviſees, reſiduary Legatee and Executors, and altered ſeveral of th former Legacies, and inſerted or interlined new Legacies; and ſoon after wrote another Will with his own Hand, agreeable in a great Meaſure, but not altogether, to the Will or Duplicate ſo altered, with Concluſion in theſe Words; "In witneſs whereof I the ſaid Teſtator have to each Sheet "ſet my Hand, and to the Top, where the Sheets are fixed together "my Hand and Seal, and to the laſt thereof my Hand and Seal, and to a "Duplicate of the ſame Tenor and Date, this Day of "1730." But there was no Signing, or fixing together. Teſtator ſoon after began to write another Will, Word for Word with the laſt, ſo far as it goes, but went no farther then deviſing his Lands. Teſtator lived ſix Days after, and was in good Health, and might have finiſhed and executed both or either of the latter Wills if he had thought fit. Teſtator never ſent or called upon *B.* for the Duplicate of the firſt Will in his Hands, though *B.* lived in Town. After the Death of the Teſtator, all the Teſtamentary Papers or Schedules were found lying all in looſe and ſeparate Papers upon a Table in his Cloſet, not ſigned or executed; and the Duplicate of the firſt Will was found on the ſame Table, altered and obliterated; *(ut ſupra)* with his Name and Seal thereto whole and uncancelled. Sentence was given in the Prerogative Court, for the Duplicate of the firſt Will in *B.*'s Hands, and confirmed upon Appeal to the Delegates, *viz.* Lord *Raymond* Ch. J. and *Probyn* J. Dr. *Tindale* and Dr. *Bramſton*, (who were all the Delegates preſent) after four Days ſolemn Hearing, and upon a Commiſſion of Review (granted by Lord Chanc. *King*, upon the Petition of *Hyde* the Executor named in the new Will) was again affirmed by the Opinion of all the Delegates (except Dr. *Pinfold*) *viz.* of the Judges *Reynolds* C. B. *Page* J. and *Comyns* B. and two Doctors of the Civil Law, chiefly on the Reaſon, as the

the Reporter ſays he heard, that the Teſtator did not intend an Inteſtacy, and by the Alterations and Obliterations, in his own Duplicate of his firſt Will, he appeared only to deſign a new Will, which as he never perfected, the firſt ought to ſtand; and Teſtator not calling for the Duplicate of the firſt Will in *B.*'s Hands ſtrengthens the Preſumption of his Intent not abſolutely to deſtroy his firſt Will, till he had perfected another, which he never did.

53. *J. S.* deviſed all his Real and Perſonal Eſtate to Truſtees *A. B.* and *C.* their Heirs, Executors and Adminiſtrators, in Truſt to pay 15*l. per Annum* to the Plaintiff (his two Siſters) for their Lives, and after ſeveral Legacies, the Surplus in Truſt for the Diſſenting Miniſters at *Reading*, *&c.* and gave 300*l* to each Truſtee, and 20*l. per Annum* to each, while they took Care in executing the Truſt. Afterward by Leaſe and Releaſe of ſubſequent Date to the Will, the Teſtator conveyed all his Real Eſtate unto and to the Uſe of the ſaid *A. B.* and *C.* and their Heirs, with a Proviſo to be void on Payment of 10*s*. And by another Deed of the ſame Date, the Teſtator gave all his Perſonal Eſtate to ſaid *A. B.* and *C.* Proviſo to be alſo void on Payment of 10*s*. But *J. S.* kept both the Deeds in his own Cuſtody, and ſoon after died; and the ſaid *A. B* and *C* obtained Adminiſtration *cum Teſtamento annexo* as Truſtees. The Truſtees for ſome Years paid the 15*l. per Annum* a-piece to each of the Teſtator's Siſters; but afterwards refuſed to continue the Payment thereof, and alſo refuſed to pay any of the Diſſenting Miniſters; but kept the Rents, *&c.* to their own Uſe. The two Siſters (the Heirs at Law) and their Huſbands, brought their Bill againſt the ſurviving Truſtee, inſiſting that the Deed of Conveyance of the Real Eſtate, and the Deed of Gift of the Perſonal Eſtate had revoked the Will, and that there was a reſulting Truſt for them, as Heirs at Law; or at leaſt that they (the Siſters) were intitled to their 15*l. per Annum* Annuities. Defendant inſiſted on Plaintiffs having forfeited their Annuities by bringing their Bill, there being a Clauſe in the Will, that if they (the Siſters diſputed the Will, then they ſhould forfeit their Annuities. Lord Chanc. *Talbot* decreed, that the Annuities ſhould be paid to the two Siſters, with the Arrears and growing Payments thereof; but the Surplus was decreed to go to the Diſſenting Miniſters.

MSS Rep. Mich. 1734. Lloyd *& Ux.* & *al'* v. Spillet & *al'*.

54. Sir *John Wobrych* by Will in *Auguſt* 1722 deviſed his Eſtate to Truſtees for the Term of 200 Years, for Payment of all his Debts. In *December* following he deviſed the ſame to other Truſtees for 300 Years, in Truſt to pay ſome particular Debts by Specialty mentioned in the Deed, and all Incumbrances that affected the Eſtate. In *June* 1723 he died; and the Queſtion was, If the Deed in *December* was a total Revocation of the 200 Years Term? And at the Rolls both Terms being held to be conſiſtent, the Plaintiff now brought a Bill of Review; and *Talbot* Lord Chanc. was of Opinion, that the Deed in *December* was intended only as a collateral Security, for Payment of the Debts therein mentioned, and ſuch others as were a Charge on the Eſtate; and that Sir *John* did not depart from his former Intentions of paying all his Debts, but only to give Preference to thoſe comprized in the 300 Years Term, who by Law were preferred to the Simple contract Debts; and therefore he declared, that ſo much of the 200 Years Term ſhould be ſold as would ſatisfy the Purpoſes of the Deed; and afterwards the 200 Years Term ſhould commence.

MSS. Rep. Mich 9 Geo. 2. Weld *v.* Acton, *&c.*

2. In

2. In what Caſes the Court will ſet aſide a Will for Fraud.

2 Will. Rep. 270. James v. Greaves.

55. *Jekyl* Lord Commiſſioner took a Difference between a Will and a Deed gained upon a weak Man, and upon a Miſrepreſentation or Fraud; for if a Will be gained from ſuch by falſe Miſrepreſentation, this is not a ſufficient Reaſon to ſet it aſide in Equity; as was determined in the Duke of *Newcaſtle*'s Will, betwixt Lord *Thanet* and Lord *Clare*, and in the Caſe of *Bodvil* and *Roberts*: But where a Deed which is not revocable as a Will is, is ſo gained from ſuch a Perſon, and without any valuable Conſideration, the ſame ought to be ſet aſide in Equity.

Vin. Abr. tit. *Deviſe*, (Z. 2.) Ca 7 p. 167. Moneypenny v. Brown.

56. A Will obtained *in Extremis* and upon Importunity of Teſtator's Wife, his Hand being guided in the writing of his Name, has been ſet aſide.

57. A Will likewiſe concerning Land may be good at Law, as being well executed, and yet be ſet aſide in Equity for Fraud: As where—

1 Will. Rep. 287, 289. Goſs v. Tracy. If *A.* had deviſed Lands to *M.* in Fee, and afterward *J. S.* had told *A.* and not *M.* that the Will was void for want of its being well guarded; and that he would make another Will for *A.* that ſhould be effectually guarded, and accordingly had made another Will for *A.* whereby the Eſtate had been deviſed to *M.* for Life only. Remainder to *J. S.* in Fee, this would be a good Will in Law, if atteſted purſuant to the Statute of Frauds, but would be ſet aſide in Equity for the Fraud; but as to the Evidence of the Teſtator's being *non compos* when he made this ſecond Will, that is to be tried at Law. *Per* Lord Chanc. Ibid. 288. A Will, though good at Law, may yet be ſet aſide in Equity for Fraud: As if *A.* ſhould agree to give *B.* Bank Bills to the Amount of 1000*l.* in Conſideration that *B.* would make his Will, and thereby deviſe his Land to *A.* and accordingly *B.* does make his Will, and *A.* gives *B* the Bank Bills, which prove to be forged; this though a good Will at Law, ſhall nevertheleſs be avoided in Equity by *A.*'s Heir for a Fraud. *Per* Lord Chanc. Ibid. 2 Vern. Rep. 699. See in 1 Chan. Rep. 12, 66. Inſtances of a Will of Land being ſet aſide in Equity for Fraud.

58. *A.* by Will had deviſed his Lands to *M.* his Mother in Fee; *M.* was afterwards told by *J. S.* that this Will would not be good, but ought to be guarded, as he called it, and that he would make another Will for *A.* which he would take Care ſhould be ſufficiently guarded. *J. S.* afterward drew a Will, by which *A.* gave the Land to *M.* for Life only, Remainder to *J. S.* in Fee. Upon a Bill to eſtabliſh the firſt Will, becauſe of the ill Practices uſed in obtaining the after Will, Lord Chanc. *Cowper* directed an Iſſue in *Middleſex*, where the Will was made, though the Lands lay in *Shropſhire*, to try whether the Will, by which the Lands in Fee were deviſed to *M.* was the Laſt Will of *A.*

Vin. Abr. tit. *Deviſe*, (Z. 2.) Ca. 11. p. 167. Bransby v. Keridge, &c.

59. A Bill was brought to be relieved againſt a Will obtained by Fraud and Impoſition, upon this Caſe. The Plaintiff's Son had made a Will in *January* 1716, and thereby deviſed all his Real and Perſonal Eſtate to the Plaintiff, his Father, but falling ill ſoon after, at a great Diſtance from his Father, of a Conſumption, of which he died, Defendant perſuaded him to make a new Will, ſome ſhort Time before his Death, whereby he deviſed all his Real and Perſonal Eſtate to Defendant (being his Kinſman) upon Truſt to pay his Debts and Legacies; but ſays nothing of the *Reſiduum*; but there was a general Clauſe of revoking all former Wills, &c. There were ſeveral Witneſſes to prove an Impoſition and Contrivance, and falſe Suggeſtion to induce the Teſtator to make this new Will, ſufficient to ſatisfy the Court that it was unfairly obtained, but the Will was regularly ſigned, ſealed, and publiſhed, according to the Statute of 29 *Car.* 2. and ſo a good Will at Law. Lord Ch. J. *Parker*, having taken Time to conſider of it, decreed Defendant to account for the Perſonal Eſtate, having juſt Allowances, &c. and to convey the Real Eſtate to Plaintiff, ſubject to the Payment of Teſtator's Debts, as a Truſtee for the Plaintiff.

60. A Bill

60. A Bill was likewiſe brought to ſet aſide a Will of a Perſonal Eſtate, and to ſtay the Probate, upon a Suggeſtion of its being obtained by Fraud; and the Defendant demurred to the Juriſdiction of Chancery, whereupon an Injunction was moved for, inſiſting that the Demurrer confeſſed the Fraud, and that Fraud was cognizable in Equity as well as in the Spiritual Court; but the Injunction was denied. 2 Will. Rep. 286. Stephenton v. Gardiner. And per Cur. the Spiritual Court has Juriſdiction of Fraud relating to a Will of Perſonal Eſtate, and can examine the Parties by Way of Allegation touching the ſame, and if the Will was read falſely to Teſtatrix, then it was not her Will. Ibid.

61. Where a Bill is brought to prove a Will of Lands, the Sanity of the Teſtator muſt be proved; but it is otherwiſe in Caſe of a Deed of Truſt to ſell for Payment of Debts. 3 Will. Rep. 93. Harris v. Ingledew. A Will was ſet aſide after forty Years Poſſeſſion under it, upon Account of the Inſanity of the Deviſor, and although in Prejudice of a Purchaſer. Vin. Abr. tit. Deviſe, (Z. 2.) P. 169. Squire v. Perſhall.

N. B. A Will having relation only to the Teſtator's Death, and not to the Making: For till his Death he is Maſter of his own Will, and therefore the Will of a Papiſt in *Ireland*, was held to be avoided by a ſubſequent Statute made in that Kingdom, which enacts, that the Lands of Papiſts there ſhall not be deviſeable, but deſcend in Gavelkind. Vin. Abr. tit. Deviſe, (H. 6.) Ca. 7. p. 273. Burk v. Morgan.

3. Where Fraud in obtaining a Will is examinable.

62. It has been ſaid, that Wills (of Perſonal Eſtates only) though gained by Fraud, if proved in the Spiritual Court, are not to be controverted in Equity. Thus where—

63. *A.* made his Will, and thereby gave the Plaintiff the greateſt Part of his Perſonal Eſtate, to the Value of 5000*l.* as was proved in the Caſe, but one *B.* his Maid-Servant, had in his Sickneſs, prevailed on him (as was alledged) to make another Will, and to marry her a Week before his Death, when he lay in his ſick Bed, at ſix of the Clock at Night, though it was really proved by two Miniſters, that ſhe was, a Year before, actually married to the Defendant *M.* and was then his Wife; and that *M.* procured the Licence for the Marriage of *A.* to *B.* And this Will being ſet up by *M.* Executor to *B.* though it appeared there was as groſs Practice as could be, in gaining the Will, the Teſtator being *non compos*, both at the Time of making this Will, and alſo at the Time of his ſuppoſed Marriage; and that in his Health he knew that *M.* and *B.* were married; and that *B.* ſuppreſſed the firſt Will: Yet that Will ſo ſet up, being proved in the Prerogative Court, and the Matter in Queſtion being purely relating to the Perſonal Eſtate, the Lord Chanc. was of Opinion, that whilſt that Probate ſtood, this Matter was not examinable in Chancery; and though the Fraud was fully proved, and was opened to him he would not hear any Proofs read, but diſmiſſed the Bill. 2 Vern. 8. & 9. Archer v. Moſſe.

64 So where an Executor proved a Will of a Perſonal Eſtate, wherein one of the Legacies was forged; it was decreed, that the Executor had no Remedy in Equity; but ought to have proved the Will, with a ſpecial Reſervation as to that Legacy. 1 P. Williams 388. Plume v. Beal.

65. But though Wills (of Perſonal Eſtates only) gained by Fraud, and proved in the Spiritual Court, are not to be controverted in Equity, yet if the Party claiming under ſuch Will comes for any Aid in Equity he ſhall not have it. 2 Vern. 76. Nelſon v. Oldfield.

66. It has been determined likewiſe, that the Courts of Equity can hold Plea concerning a Legacy, and likewiſe concerning the Deviſe of the *Reſiduum*, 1 Str. 673. Marriot v. Marriot.

ſiduum, which is but a Legacy: And they may in notorious Caſes decree a Legatee, who has obtained a Legacy by Fraud, to be a Truſtee for another: As if the Drawer of the Will ſhould inſert his own Name inſtead of the Name of a Legatee.

1 Abr. Eq. Ca. 406. Bransby *v.* Kerridge.

67. But it has been decreed in the Houſe of Lords, that a Will of a Real Eſtate could not be ſet aſide in a Court of Equity for Fraud or Impoſition, but muſt firſt be tried at Law on *Deviſavit vel non*, being Matter proper for a Jury to inquire into.

☞ Since the Sheet which contains the Matter relative to *Signing*, *Atteſtation*, &c. was worked off, the Caſe of *Windham* v. *Chetwynd* has been publiſhed in Maſter *Burrow*'s Reports, wherein the principal Objection was, that the ſubſcribing Witneſſes to the Will were not at the *Time* of their ATTESTATION, *credible* Witneſſes: And the Judgment of the Court thereon, as delivered by Lord *Mansfield*, is ſtated in a very full and perſpicuous Manner: In this Judgment is explained what is to be underſtood by the Words *Credible* and *Competent*; and after entering very largely into the Law reſpecting Atteſtations, it is determined that a Benefit given to a ſubſcribing Witneſs ſhould not annul his Atteſtation, and make the Will void, as *at the Time of his* SUBSCRIBING, if at or after the Teſtator's Death, the Witneſs be diſintereſted, and *competent* to be examined in Support of the Will.

This Judgment has not, that the Editor knows of, been ſhaken by any ſubſequent *Adjudication*; though it muſt be added, that ſome of the Principles on which it is founded, have been lately controverted.

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FINIS.

A

SUPPLEMENT

TO

Bacon's Abridgment,

CONTAINING,

I. A TABLE of the NAMES of the CASES;

II. A TABLE of the STATUTES, or ACTS of PARLIAMENT cited, referred to, or explained;

III. A TABLE of the REPORTERS and other WRITERS, with their ſeveral CONTRACTIONS and EDITIONS:

TOGETHER WITH A NEW AND COPIOUS

IV. GENERAL INDEX, or TABLE of the PRINCIPAL MATTERS.

By T. CUNNINGHAM, Eſq; BARRISTER AT LAW.

DUBLIN:

Printed for LUKE WHITE, No. 86, DAME-STREET.

M DCC LXXXVII.

ADVERTISEMENT.

FROM the Circumſtances attending the Manner of the firſt Publication of the ſeveral Volumes of *Bacon's Abridgment* *, it has hitherto proved a principal Defect in that valuable and copious Fund of uſeful and important Learning, that for want of proper Tables or Indexes to it, a great Part of the original Information it contains, as well as the more modern Caſes that have been added, are not to be found without ſuch Inconvenience and Loſs of Time, as greatly to retard and prevent the proper Uſe of that extenſive Work. The Compiler of the preſent Tables, having long and much experienced theſe Diſadvantages in the Courſe of very frequent Peruſals and References to the NEW ABRIDGMENT, has in the preſent Publication ſupplied a Purpoſe ſo very deſireable to thoſe who are poſſeſſed of this valuable Work, by the following new Tables.

1ſt. A Table of the Names of near 6000 Caſes therein abridged and digeſted, formed upon the Plan of that compiled by Mr. *Viner*, and annexed to his general Abridgment of Law and Equity, with this only Difference, that the References in the preſent Table are to the Volume and Page, and not to the Titles and Diviſions as in Mr. *Viner*'s Table; becauſe many modern Publications have cited Caſes and referred to the Volume and Page of *Bacon*'s *Abridgment*, and not to the Titles and Diviſions thereof; and becauſe it is much more eaſy to find the Caſes by the former than by the latter Method.

2d. A Table of the Statutes, or Acts of Parliament cited, referred to, or explained; being compiled on the Model of that prefixed to *Cay*'s Abridgment of the Statutes. The Utility of this Table is obvious to any Perſon who wants to ſee the Comments and Obſervations of the Courts of Juſtice upon any particular Act.

3d. A Table of the Reporters and other Writers, with their ſeveral Editions and Contractions, that are occaſionally made uſe of in the new Abridgment; being found a neceſſary Addition to Works of this Kind, as appears from ſimilar Tables prefixed to *Comyns*'s Digeſt and *Viner*'s Abridgment.

4th. An enlarged general Index, or Table of the principal Matters contained in the Work; ſo very copious and extenſive as to contain 1537 Heads and Titles of Law, whereas in the very imperfect and defective

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* The three firſt Volumes of this Work were publiſhed in the Year 1736, without an Index, by Mr. *Bacon*, who intitled it *A new Abridgment of the Law*; and the 4th and 5th Volumes were afterwards publiſhed by different Hands.

Table

Table originally annexed to the Work, there are only 625 Heads. The Editor hath only to obſerve, that as all the four Editions of *Bacon*'s *Abridgment* are paged alike, theſe Tables are equally uſeful and neceſſary to complete any one of them; and that he inſerted no Head in the general Index, for which there is not a Precedent in *Comyns*'s *Digeſt*, *Viner*'s *Abridgment*, Judge *Blackſtone*'s Works, or ſome other well-known Law Book: and he ſubmits the whole to every candid and intelligent Reader, who will, no doubt, pardon any Imperfection he may meet with, when he conſiders the Time ſpent, the vaſt Labour employed, and the great Pains taken to compile the ſeveral Tables now offered to his Examination.

T. C.

Gray's Inn,
November 20, 1786.

AN

AN

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